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No.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EFREM BERNAL,

Petitioner,

v.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas, and SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS SULLIVAN
DENIS A. DOWNEY

Downey & Sullivan
1185 F.M. 802, Suite 3
Brownsville, Texas 78520
(512) 544-0561

CORNISH F. HITCHCOCK
(Counsel of Record)
ALAN B. MORRISON
JOHN CARY SIMS

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

14 October 1983

Attorneys for Petitioner

QUESTION PRESENTED*

May a state constitutionally deny all resident aliens the opportunity to become notaries public, while under *In re Griffiths*, 413 U.S. 717 (1973), qualified resident aliens cannot be denied admission to the bar or be denied the right to administer oaths and perform other functions similar to those carried out by notaries public?

*In addition to the parties identified in the caption, Margarita M. Vargas was a plaintiff-appellee in the proceedings below.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-

EFREM BERNAL,

Petitioner,

v.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas, and SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REFERENCE TO OPINIONS

The opinion of the United States District Court for the Southern District of Texas, Brownsville Division, dated 9 October 1981, which declared unconstitutional the Texas statute at issue in this case and which contains that Court's findings of fact and conclusions of law, is reproduced in the Appendix ("App.") at pages 5a-13a. The opinion is not reported.

The opinion of the United States Court of Appeals for the Fifth Circuit, in which a divided panel of that Court reversed the district court and upheld the constitutionality of the statute, is reported at 710 F.2d 190 (1983) under the name *Vargas v. Strake* (App. 15a-28a).

JURISDICTION

The judgment of the court of appeals was entered on 25 July 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, states in pertinent part:

> . . . No State shall make or enforce any law which shall. . . deny to any person within its jurisdiction the equal protection of the laws.

Texas Revised Civil Statutes Annotated article 5949(2) (1982) states in pertinent part:

> To be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United States and of this State and at least eighteen (18) years of age. . . .

STATEMENT OF THE CASE

This case was originally filed by Margarita M. Vargas, who was then a citizen of the Republic of Mexico, to challenge the constitutionality of Tex. Rev. Civ. Stat. Ann. art. 5949(2) insofar as it requires a person to be a citizen of the United States in order to be eligible for appointment as a notary public in Texas. Jurisdiction was properly based on 28 U.S.C. §§ 1331, 1343(3) and (4).

When the complaint was filed, Vargas was a lawful resident alien in this country. She worked as a secretary/receptionist in a real estate office in Brownsville and wished to become a notary public so that she could administer oaths and take sworn statements from clients of her office. While the litigation was pending, she became a United States citizen and is thus eligible to become a notary public. This case is therefore moot as to her. App. 3a.

Petitioner Efrem Bernal was added as a party plaintiff in district court. He is a lawful resident alien who has been living in the United States for approximately 20 years and was educated in this country. From 1974 to 1978, he was employed in a migrant legal services program in Indiana, during which time he was a notary public in that state. Since 1978 he has been employed as a paralegal for Texas Rural Legal Aid, Inc. in Hidalgo County. Petitioner stated in his deposition, filed with the district court, that he works exclusively with migrant farm workers on employment and civil rights issues and takes statements from them in the field. If commissioned as a notary public, he would be able to notarize these statements in the field, rather than having to bring along someone else to administer oaths.

Respondent John W. Fainter, Jr. is Secretary of State of the State of Texas and is automatically substituted for his predecessor, George W. Strake, Jr., pursuant to Rule 40.3 of the Rules of this Court. Respondents Joe Rivera and Santos Saldana are the county clerks for Cameron and Hidalgo Counties, respectively. At the time this suit was brought, the Texas notary public statute required applicants for a commission to submit a standardized application form to the local county clerk, who then forwarded it to the Secretary of State for consideration. Since then, the statute has been amended to make the Secretary of State solely responsible for processing such applications.

In 1978, petitioner applied to become a notary public in Texas, but his application was denied. He appealed that decision and was given an administrative hearing, but the denial was upheld on the sole ground that he was ineligible for appointment as a notary public because of the citizenship requirement in Tex. Rev. Civ. Stat. Ann. art. 5949(2).

In district court, the case was submitted on the basis of stipulated facts (reproduced in the Appendix at pages la-4a). The court declared Tex. Rev. Civ. Stat. Ann. art. 5949(2) to be unconstitutional as a denial of the equal protection of the laws and enjoined the respondents from refusing to consider the applications of Vargas and Bernal to become notaries public.

The court of appeals reversed, with two judges (Reavley and Politz, JJ.) holding that the statute did not violate equal protection guarantees, on the ground that the exclusion of resident aliens bore a rational relationship to a legitimate state purpose under this Court's opinion in *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). Judge Ingraham dissented. He argued that the majority had misread *Cabell* and that this case is controlled by *In re Griffiths*, 413 U.S. 717 (1973), which invalidated a ban on the admission of aliens to the Connecticut bar. He further noted that "the authority accorded Connecticut lawyers encompasses every function performed by Texas notaries public." App. 25a.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW CONFLICTS WITH THE RELEVANT OPINIONS OF THIS COURT AND WITH THE DECISIONS OF EVERY OTHER COURT WHICH HAS CONSIDERED THE ISSUE.

1. The petition should be granted because the court of appeals failed to follow this Court's decision in *In re Griffiths*,

supra, which dealt with admission of resident aliens to a state bar. The court of appeals not only failed to analyze *Griffiths*, but it relegated the case to a footnote, App. at 19a n.3, even though *Griffiths* was re-affirmed last year in *Cabell v. Chavez-Salido, supra*, 454 U.S. at 439-40.

In *Griffiths*, this Court invalidated on equal protection grounds a Connecticut court rule denying bar admission to resident aliens. This citizenship requirement also barred resident aliens from serving as Commissioners of the Superior Court, an office to which all Connecticut lawyers are appointed. In this latter capacity, they may "sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds." Conn. Gen. Stat. Rev. § 51-85. This Court found that the citizenship restriction could not withstand strict scrutiny because the functions of lawyers and Commissioners of the Superior Court "hardly involve matters of state policy or acts of such major responsibility as to entrust them only to citizens." 413 U.S. at 724.

The Connecticut statute at issue in *Griffiths* encompassed all the powers granted to Texas notaries public, who shall "have the same authority to take acknowledgments or proof of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions as is now or may hereafter be conferred by law upon County Clerks ...." Tex. Rev. Civ. Stat. Ann. art. 5954. There is thus an irreconcilable conflict between *Griffiths* and the court of appeals' decision.

Even though Texas may not preclude all resident aliens from becoming notaries public, it is not powerless to regulate their qualifications. As this Court recognized in *Griffiths*, "the possibility that some resident aliens are unsuited to the practice of law [cannot] be a justification for a wholesale ban." 413 U.S. at 725. A state "has wide freedom to gauge on a case-by-case basis the fitness of an applicant" and to "require

appropriate training and familiarity" with state laws. *Id.* These principles apply with equal force to the licensing of notaries public. There is no showing in the record that serving as a notary public in Texas is so complex or important a function that it should be entrusted only to citizens.

On the same day that this Court decided *Griffiths*, it also invalidated a wholesale ban on aliens serving in a state's competitive civil service. *Sugarman v. Dougall*, 413 U.S. 634 (1973). Since then, the Court has applied strict scrutiny analysis to invalidate state statutes which denied resident aliens the right to be licensed as a civil engineer, *Examining Board of Engineers v. Flores de Otero*, 426 U.S. 572 (1976), and to receive financial assistance for higher education. *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

In *Sugarman*, this Court carved out an exception to the rule of strict scrutiny, indicating that it would not be utilized when the classification applies to "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government." *Sugarman v. Dougall, supra*, 413 U.S. at 647. As refined in subsequent cases, the *Sugarman* exception requires a state to show that (1) a challenged classification is not "substantially over or underinclusive," and (2) even if the classification is "sufficiently tailored," it is limited to "state elective or important non-elective" positions. *Cabell v. Chavez-Salido, supra*, 454 U.S. at 440. As thus refined, the *Sugarman* exception has been applied to uphold classifications which barred aliens from serving as police officers, *Foley v. Connelie*, 435 U.S. 291 (1978), public school teachers, *Ambach v. Norwick*, 441 U.S. 68 (1979), and peace officers, *Cabell v. Chavez-Salido, supra*.

The court of appeals examined the Texas restriction under the *Sugarman* exception, even though, unlike *Foley*, *Ambach*,

and *Cabell*, notaries are not government employees. Indeed, as this Court indicated in *Griffiths*, Commissioners of the Superior Court do not hold the sort of "important" office which would warrant application of this exception, 413 U.S. at 724. If the court of appeals decision is allowed to stand, and administering oaths is thus regarded as a vital state function, not only will there be a conflict with *Griffiths*, but it is hard to imagine what kind of minimal state function would not qualify as "important," such that classifications involving resident aliens would be examined under the *Sugarman* exception.

2. The writ should also be granted because the court of appeals' decision contradicts every other lower court opinion which has addressed this issue. Virtually identical statutes have been invalidated in recent years by the Florida Supreme Court, *Graham v. Ramani*, 383 So. 2d 634 (1980), and by federal district courts in Maryland and Illinois. *Taggart v. Mandel*, 391 F. Supp. 732 (D. Md. 1975)(three-judge court); *Cheng v. Illinois*, 438 F. Supp. 917 (N.D. Ill. 1977). The court of appeals majority did not even cite these decisions, let alone explain why it believed they are incorrect. In this regard, it should be noted that the court of appeals' decision, if allowed to stand, will have an impact beyond Texas. Seventeen other states have statutes which require United States citizenship as a condition for being licensed as a notary public.[1] Thus, this

[1] Some of these statutes are similar to the Texas law in that they explicitly state that only citizens of the United States can qualify as notaries public. *See* Del. Code § 29-4301(b); Ga. Official Code Ann. § 71-101; Mo. Rev. Stat. § 486.010; Mont. Code Ann. § 1-5-402; McKinney's Consol. Laws of N.Y., Executive Law § 130; Okla. Stat. § 49.1; Code of Va. § 47.1-4; Wyo. Stat. § 32-1-101. Other statutes require notaries public to have the same qualifications as voters and require voters to be United States citizens. *See* Idaho Code § 51-101 and § 34-402; N.H. Rev. Stat. Ann. ch. 455, § 1 and ch. 654, § 1; N.M. Stat. Ann. § 14-12-2 and §1-1-4; *cf.* N.M. Const. art. VII-1 (as amended); N.D. Century Code § 44-06-01 and § 16.1-01-04; *cf.* N.D. Const. art. II, § 1; Purdon's Penna. Stats. Ann. Title 57, § 149 and Title 25, § 2811; R.I. Gen. Laws § 42-30-5 and R.I. Const. art. 38, § 1; S.C. Code of Laws § 26-1-10 and § 7-5-120; Utah Code Ann. § 46-1-1 and § 20-1-17; Wash. Rev. Code § 42.28.010 and Wash. Const. art. VI, § 1, as amended by amendment 5.

conflict in lower court decisions and the likelihood of further litigation over similar statutes in other states provide additional reasons for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CORNISH F. HITCHCOCK
(Counsel of Record)
ALAN B. MORRISON
JOHN CARY SIMS

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

THOMAS SULLIVAN
DENIS A. DOWNEY

Downey & Sullivan
1185 F.M. 802, Suite 3
Brownsville, Texas 78520
(512) 544-0561

Attorneys for Petitioner

14 October 1983

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARGARITA M. VARGAS, et al.	)	
	)	C.A. No. B-79-147
VS.	)	
	)	
GEORGE W. STRAKE, JR., et al.	)	

AMENDED STIPULATION OF FACT

NOW COME, MARGARITA M. VARGAS and EFREM BERNAL, Plaintiffs, and George W. Strake, Jr., Joe Rivera, and Santos Saldana, Defendants, and stipulate:

1. At all times relevant hereto, the Secretary of State prescribed the form entitled, "Application for Appointment as Texas Notary Public," a true copy of which is attached hereto as Exhibit A, to the 254 County Clerks of the State of Texas, including Defendants Rivera and Saldana.

2. At all times relevant hereto, the 254 County Clerks of the State of Texas, including Defendants Rivera and Saldana, uniformly required an applicant for appointment as a Texas notary public to complete the application, i.e., Exhibit A, and the County Clerk returned the completed applications to Defendant Strake for consideration as more fully set forth at Tex.Rev.Civ.Stat. art. 5949(3) (1971).

3. The policy of the Secretary of State is as follows: When the application for appointment as a notary public indicates

that the applicant is not a United States Citizen that applicant is not appointed; such an application is held pending further communication with the applicant; and if the applicant communicates that he or she is also applying for United States Citizenship, no further action is taken on the application until a determination is made by the Immigration and Naturalization Service on the grant or denial of citizenship. If the applicant advises that he or she is not applying for United States citizenship, the Secretary of State's Office will set an adminstrative hearing.

4. Plaintiff Efrem Bernal is a resident alien of the United States and is properly registered with the United States Immigration and Naturalization Service. He has not applied for United States citizenship.

5. Plaintiff Bernal is 31 years of age, having been born at Valle Hermosa, Tamaulipas, Mexico, on June 18, 1950.

6. Plaintiff Bernal is a resident of Hidalgo County, Texas. He now resides at 1212 East Lucas, Pharr, Texas.

7. After his arrival in the United States Plaintiff Bernal attended the public schools of the Pharr-San Juan-Alamo Independent School District in Hidalgo County, Texas and graduated from Pharr-San Juan-Alamo High School.

8. At the present time Plaintiff Bernal is employed by Texas Rural Legal Aid, Inc. as a paralegal assistant. He has been employed in that capacity for three years.

9. Plaintiff Bernal was previously employed at AMOS, Inc., a migrant legal services program, in the City of Plymouth, Marshall County, Indiana. He served as a notary public for Marshall County, Indiana from 1974-1978.

10. Plaintiff Bernal applied to become a notary public in the State of Texas on October 4, 1978, a true copy of his application being attached hereto as Exhibit B.

11. On October 12, 1978, Plaintiff Bernal's application to be a notary public was not granted by Defendant Strake and Plaintiff Bernal appealed the decision. The complete file of the proceedings, including the final decision and order of Defendant Strake, is attached hereto as Exhibit C.

12. Plaintiff Margarita M. Vargas was a resident alien of the United States and was properly registered with the United States Immigration and Naturalization Service. She obtained United States citizenship in 1981.

13. Plaintiff Vargas is 29 years of age, having been born at Cerritos, San Luis Potosi, Mexico, on December 30, 1951.

14. Plaintiff Vargas has been a resident of Brownsville, Cameron County, Texas since 1974. She now resides at 1746 East Southmost, Brownsville, Texas.

15. After her arrival in the United States Plaintiff Vargas attended the public schools of Santa Paula, California, graduating from high school at Santa Paula, California, and she attended Moorpark College at Moorpark, California, and was awarded the degree of Associate of Arts.

16. Plaintiff Vargas was employed by Baldauf-Echols Company, realtors, as a secretary/receptionist. Prior to that, she was a legal secretary.

17. Plaintiff Vargas applied to become a notary public on June 27, 1979, a true copy of her application being attached hereto as Exhibit D.

18. On July 10, 1979, Plaintiff Vargas' application to be a notary public was neither granted nor rejected but retained by Defendant pursuant to memorandum, a true copy of which is attached hereto as Exhibit E.

19. Plaintiffs desire to become notary publics in order to authenticate signatures to deeds, affidavits, and other legal

documents in the course of their employment.

20. Texas has an extensive border with Mexico.

APPROVED:

Thomas Sullivan
P.O. Box 71
Brownsville, Texas 78520

ATTORNEY FOR
PLAINTIFFS

Martha H. Allan
Assistant Attorney General
of Texas
Supreme Court Building
Austin, Texas 78711
ATTORNEY FOR
DEFENDANT GEORGE W.
STRAKE, JR.

Roy Dale
Assistant District Attorney
Cameron County
974 E. Harrison Street
Brownsville, Texas 78520

ATTORNEY FOR
DEFENDANT JOE RIVERA

Juan Partida
Assistant District Attorney
Hidalgo County
100 N. Closner
Edinburg, Texas 78539

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARGARITA M. VARGAS, ET AL	)	C.A. No. B-79-147
VS.	)	
	)	FILED
GEORGE W. STRAKE, JR.	)	OCT 9, 1981
		JESSE E. CLARK, CLERK

MEMORANDUM AND ORDER

INTRODUCTION

This action is brought by Margarita M. Vargas and Efrem Bernal seeking to have this Court declare unconstitutional and enjoin the enforcement of Tex. Rev. Civ. Stat. Ann. art. 5949(2) insofar as it requires one to be a citizen of the United States in order to be eligible for appointment as a notary public.

The lawsuit, originally filed by Ms. Vargas as a class action on behalf of similarly situated legal resident aliens interested in being appointed to the office of notary public, is brought by way of 28 U.S.C. § 2201 and 2203, and 42 U.S.C. § 1983. The suit was subsequently amended to add plaintiff Bernal, upon the filing by Ms. Vargas of her application for United States citizenship. A further amendment eliminated the class action allegation, and the case is now tried before the Court as an individual action by plaintiffs Vargas and Bernal.

The defendants are George W. Strake, Jr., Secretary of State of the State of Texas, Joe Rivera, County Clerk of Cameron County, Texas, and Santos Saldana, County Clerk of Hidalgo County, Texas.

JURISDICTION

Jurisdiction is conferred on the Court by 28 U.S.C. § 1343(3) and (4), which provides for original jurisdiction in civil actions to redress the deprivation under color of state law of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights or civil rights of all persons within the jurisdiction of the United States.

The court has carefully considered the extensive briefs of the parties and the evidence presented, and concludes that the case is properly before the court for determination, that the particular requirement of Article 5949 is violative of minimum constitutional standards and that appropriate declaratory and injunctive relief is necessary.

FINDINGS OF FACT

This case is presented to the court upon stipulated facts.

Margarita M. Vargas was born at Cerritos, San Luis Potosi, Mexico, on December 30, 1951. After her arrival in the United States she attended public schools at Santa Paula, California, and attended Moorpark College at Moorpark, California, and was awarded the degree of Associate of Arts. Ms. Vargas was employed by Baldauf-Echols Company, realtors, as a secretary-receptionist. Prior to that, she worked as a legal secretary. Ms. Vargas has been a resident of Brownsville, Cameron County, Texas, since December of 1974.

Ms. Vargas applied to become a notary public on June 27, 1979. At that time she was a resident alien of the United States, and was properly registered with the United States Immigration and Naturalization Service. On July 10, 1979, her application for appointment was neither granted nor rejected, but rather was retained by defendant Strake pursuant to memorandum. Ms. Vargas obtained United States citizenship in 1981, subsequent to the filing of this lawsuit.

Plaintiff Efrem Bernal was born on June 18, 1950, at Valle Hermoso, Tamaulipas, Mexico. He is presently a resident of Pharr, Hidalgo County, Texas, and is also a resident alien, properly registered with the Immigration and Naturalization Service. Mr. Bernal attended the public schools of the Pharr-San Juan-Alamo School District. Mr. Bernal is presently employed by Texas Rural Legal Aid, Inc., as a paralegal assistant, and has been employed in that capacity for three years. He was previously employed by AMOS, Inc., a migrant legal services program, in the city of Plymouth, Indiana. He served as a notary public for Marshall County, Indiana, from 1974 to 1978.

Plaintiff Bernal applied to become a notary public in Texas on October 4, 1978. Defendant Strake did not grant his application, and Bernal appealed the decision, obtaining an administrative hearing. His requested relief was not granted at that hearing.

The Secretary of State prescribed the form entitled "Application for Appointment as Texas Notary Public", to the 254 County Clerks of the State of Texas, including defendants Rivera and Saldana. The County Clerks, including defendants Rivera and Saldana, uniformly required an applicant to complete the application, the Clerk then returning the completed application to defendant Strake for consideration.

The Secretary of State has a set policy regarding these applications. When the application for appointment as a notary public indicates that the applicant is not a United States citizen, that applicant is not then appointed; his application is instead held pending further communication with the applicant. If the applicant communicates that he or she is also applying for United States citizenship, no further action is taken until a determination is made by the Immigration and Naturalization Service on the grant or denial of citizenship. If the applicant advises that he or she is not applying for citizenship, the Secretary of State's Office will set an administrative hearing on the matter.

CONTENTIONS

The issues before the court for decisions are these:

1. Has the case become moot as to plaintiff Margarita M. Vargas.

2. Have plaintiffs failed to exhaust their administrative remedies.

3. Is the statute in question unconstitutional as a denial of equal protection.

4. Is the Eleventh Amendment a bar to the relief prayed for by plaintiffs.

CONCLUSIONS OF LAW

MOOTNESS

Defendants initially claim that plaintiff Vargas' case has become moot due to the fact that she has now gained United States citizenship, and only need re-apply in order to be appointed as a notary public. A case becomes moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Powell v. McCormick*, 395 U.S. 486 (1968). A case, however, may be moot as to some issues, and yet still live as to others. *Id.* at 497; *Florida Board of Business Regulation v. National Labor Relations Board*, 605 F.2d 916, 918 (5th Cir. 1979). In the case at hand, although the issue of denial of equal protection has been rendered moot by the grant of citizenship upon Ms. Vargas, she has alleged and maintains a viable claim for damages for the period in which she was unconstitutionally discriminated against due to her alienage. The fact that she is now a citizen and thus eligible for appointment as a notary public under the statute as it stands would not automatically void her right to recover any damages she may have suffered in the past. *Johnson v. American Credit Co. of Georgia*, 581 F.2d 526 (5th Cir. 1978).

EXHAUSTION OF ADMINISTRATIVE REMEDIES

Defendants strongly argue that plaintiffs' claims are prematurely before this court in that plaintiffs have failed to exhaust their administrative remedies of appealing into the state court system. One of the exceptions to the traditional rule that state administrative remedies must first be exhausted before applying to the federal courts, however, is when the claimant is seeking to have a statute declared unconstitutional and administrative action will leave the constitutional question standing. *Public Utilities Commission v. United States*, 355 U.S. 534 (1958); *Patsy v. Florida International University*, 634 F.2d 900, 903 (5th Cir. 1981). Furthermore, state judicial remedies need not be exhausted as a prerequisite to the filing of an action under 42 U.S.C. § 1983. *Monroe v. Pope*, 365 U.S. 167 (1961).

Defendants argue that this exception should not apply in this instance since administrative interpretation of the statute might relieve its constitutional infirmity. Assuming that this is a valid argument, the court thinks it inconceivable that the phrase "resident citizen of the United States" could be interpreted to include non-citizens.

CONSTITUTIONALITY OF THE STATUTE

In order to determine the constitutionality of Article 5949, we must first decide the standard by which the statute must be judged. It is well settled that aliens come within the protective bounds of the Equal Protection Clause of the Fourteenth Amendment. *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Traux v. Raich*, 239 U.S. 33, 39 (1915); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896). Generally, classifications based on alienage have been strictly scrutinized, with the states' power to treat aliens differently than citizens being confined within narrow limits. *Graham v. Richardson*, 403 U.S. 365, 372 (1970). As stated by the Supreme Court in *Graham v. Richardson, supra*;

> "[C]lassification based on alienage, like those based on nationality or race, are inherently suspect

> and subject to close judicial scrutiny. Aliens as class are a prime example of a 'discrete and insular' minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n.4 (1938)) for whom such heightened judicial solicitude is appropriate." *Id.*, at 372. (Footnotes omitted.)

This rationale was explained by the Supreme Court in *In Re Griffiths*, 413 U.S. 717, 722 (1973), wherein Connecticut's citizenship requirement for admission to that state's bar was struck down. The court stated simply:

> "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Services, and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities."

However, non-citizens have never been clothed with the full spectrum of rights and privileges available to citizens, and rightfully so. The Constitution allows the states to differentiate between citizens and non-citizens where "important nonelective executive, legislative and judicial positions" are involved, whose officers "participate directly in the formulation, execution, or review of broad public policy [and] perform functions that go to the heart of representative government." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1972). In cases involving these positions, the state need only show a "rational relationship between the interest sought to be protected and the limiting classification." *Foley v. Connelie*, 435 U.S. 291, 296 (1978), *Ambach v. Norwick*, 441 U.S. 68, 74 (1979).

Turning our attention to the specific office of notary public in Texas, the duties thereof are set out in Tex. Rev. Civ. Stat. Ann. art. 5954, and include the authority "to take acknowledgements or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths and take depositions. . . ." Although these functions are certainly important, the court does not find that the impor-

tance of the office of notary public falls "within the classification of important non-elective officers who participate directly in the execution and review of broad public policy functions" as defendants argue. Therefore, the classification drawn in this case must be strictly scrutinized, and upheld only if it serves a compelling state interest.

In light of the strict scrutiny required by the Constitution in eyeing this classification based on alienage, the court is unable to find the compelling state interest that is necessary to constitutionality. Indeed, this court would find it difficult to uphold the citizenship requirement under the less stringent rational-basis test. The functions performed by notaries public, while aiding in the smooth operaton of a multitude of day-to-day affairs, are for the most part ministerial, lacking the close relationship with governmental policymaking and discretionary concerns spoken of in *Sugarman v. Dougall, supra*. The citizenship requirement in this case is wholly unrelated to the achievement of any valid state interest.

Arguments that the office of notary public may be abused by non-citizens are simiarly unpersuasive. As stated by the court in response to similar arguments to maintain the citizenship requirement as to notaries public in Maryland, "there is no evidence before this Court, nor would it accept any, that aliens as a class are inherently any less trustworthy than citizens." *Taggart v. Mandel*, 391 F. Supp. 733, 739 (D. Md. 1975). Furthermore, the bond requirement and provisons for removal for misconduct are adequate protections against abuses.

It should be noted here that this court does not reach or pass upon the statute's requirement of legal residence for eligibility, but only the question of citizenship as it is applied to legal, documented aliens.

ELEVENTH AMENDMENT BAR

Defendants further contend that the Eleventh Amendment bars both monetary damages and injunctive relief in this case.

The court does not reach the issue concerning damages as we find as a matter of fact that the evidence does not sustain an award of money damages.

The right to grant appropriate prospective injunctive and declaratory relief cannot seriously be challenged. The right of the federal courts to grant this type of relief from unconstitutional action was firmly established in *Ex parte Young*, 209 U.S. 123 (1907), and has been followed consistently. *See, e.g., Graham v. Richardson*, 430 U.S. 365 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970). The case of *Alabama v. Pugh*, 438 U.S. 781 (1978), cited by defendants, does not preclude injunctive relief in this case. Instead, that case holds that a federal court is precluded from granting such relief against a state. The State of Texas is not a party to this lawsuit.

The court further finds that is is authorized to award plaintiffs attorney's fees in this case. 42 U.S.C. § 1988; *Guajardo v. Estelle*, 580 F.2d 748, 763 (5th Cir. 1978).

CONCLUSION

Any finding of Fact which constitutes a Conclusion of Law shall be deemed such. Any conclusion of Law which constitutes a Finding of Fact shall be deemed such. For the reasons set forth above, this court is of the opinion that the declaratory and injunctive relief prayed for by plaintiffs should be and is hereby GRANTED, and it is hereby;

DECLARED that the citizenship requirement imposed by Tex. Rev. Civ. Stat. Ann. art. 5949(2) is unconstitutional as a denial of the equal protection of the laws to resident aliens; and it is

ORDERED that Defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, are hereby permanently enjoined from refusing to consider Plaintiffs for appointment as notaries public in Texas on grounds that they are not citizens of the United States; and it is

ORDERED that Defendants pay Plaintiffs their costs and reasonable attorneys' fees in connection with this lawsuit, the amount of such attorneys' fees to be established by affidavits to be submitted, or upon a hearing on the matter if the parties do not reach an agreement as to a reasonable amount.

Done at Brownsville, Texas, on this the 9th day of October, 1981.

/s/ Filemon B. Vela

FILEMON B. VELA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

MARGARITA M. VARGAS, et al.	)	
	)	C.A. No. B-79-147
VS.	)	
	)	FILED
GEORGE W. STRAKE, JR.	)	NOV 4, 1981
	)	JESSE E.
	)	CLARK, CLERK

JUDGMENT

Be It Remembered:

That on the 9th day of October, 1981, came on to be signed and filed the Memorandum and Order of the Court in this cause. The aforesaid Order constitutes the final judgment therein for all purposes.

It is so ORDERED, ADJUDGED and DECREED.

Done at Brownsville, Texas, this 4th day of November, 1981.

/s/ Filemon B. Vela

FILEMON B. VELA
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Margarita M. VARGAS and Efrem BERNAL, etc., Plaintiffs-Appellees,	)	
	)	
v.	)	**No. 81-2457**
	)	
George W. STRAKE, Jr., etc., et al., Defendants-Appellants.	)	

July 25, 1983.

Appeals from the United States District Court for the Southern District of Texas.

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

REAVLEY, Circuit Judge:

This case is an appeal from a district court judgment declaring unconstitutional Tex.Rev.Civ.Stat.Ann. art. 5949(2) (Supp. 1982), which requires a person to be a United States citizen in order to be eligible for appointment as a notary public in the State of Texas. We reverse.

Factual and Procedural Background

This action challenging the constitutionality of art. 5949(2) was originally brought by Margarita M. Vargas who, at the time of filing, was a citizen of the Republic of Mexico but a resident alien of the United States, lawfully registered with the Immigration and Naturalization Service and living in Texas. Vargas completed much of her education in this country, including college; she has been employed as a legal

secretary and is presently the secretary/receptionist for a real estate firm in Brownsville. After she began the suit, she obtained United States citizenship.

A second party, Efrem Bernal, was later added as an individual plaintiff. Bernal has at all times been and still is a citizen of the Republic of Mexico, but he, too, has been a lawful resident alien in this country for some years now. Bernal has been employed for several years as a paralegal assistant by Texas Rural Legal Aid, Inc. Prior to that, he was employed by AMOS, Inc. a migrant legal services program in Plymouth, Indiana. From 1974 to 1978 Bernal served as a notary public for Marshall County, Indiana.

The defendants/appellees in this action are the Texas Secretary of State and the county clerks of Cameron and Hidalgo counties. The county clerks uniformly require all applicants for the position of notary public to complete a standardized application form, which is then forwarded to the Secretary of State for consideration.

In 1979 Vargas applied to become a notary public in Texas; at that time she was still a citizen of Mexico but lawfully residing within Texas. Pursuant to established procedures, her application was received by the Texas Secretary of State. The record reveals that whenever that office receives applications from noncitizens, it either sets an administrative hearing or, if the applicant is also applying for citizenship, holds the application in abeyance pending final action of federal authorities on the application for citizenship. In Vargas' case the latter route was followed.

In 1978 Bernal had also applied to become a notary public in Texas. The Secretary of State denied his application. Bernal appealed that decision, obtaining a state administrative hearing, but the result of the hearing was that the Secretary's decision was upheld.

In the present action, Vargas and Bernal sought a declaratory judgment pursuant to 28 U.S.C. §§ 2201, 2202

that art. 5949(2) was unconstitutional because it violated the equal protection clause of the Fourteenth Amendment, insofar as it denied a lawful resident alien the opportunity to attain appointment as a notary public in Texas. No contention was made that the Texas law was an economic disadvantage to the plaintiffs. Both Vargas and Bernal admitted that neither were threatened with loss of employment or pay because they were not notaries.

Applying a strict scrutiny standard, the court held that the statute was unconstitutional as violative of the equal protection clause. The court further held that the citizenship requirement could not be upheld even under the less stringent rational relationship test. It therefore granted declaratory relief and permanently enjoined the defendants from refusing to consider Vargas and Bernal for appointment as notaries public in Texas on the ground of their citizenship status.

The defendants have brought the present appeal, raising four issues: (1) whether the action is moot as to Vargas, because she is now a United States citizen (and because only the declaratory judgment/injunctive relief portion of the district court's order is in issue); (2) whether the court erred in holding that plaintiff Bernal was not required to exhaust administrative remedies (by appealing the denial of his application by the administrative tribunal into the Texas state court system); (3) whether the district court applied an incorrect legal standard in judging the constitutionality of the statute in question (and the connected issue of the constitutionality of the statute under the appropriate standard); and (4) whether Vargas and Bernal were entitled to an award of costs and attorneys' fees.

Although the issues herein appear to have become moot as to Vargas (because she can reapply for a commission as a notary public having now attained citizenship), they are clearly not moot as to Bernal (nor do the defendants argue that they are). Moreover, Bernal was clearly not required to appeal into the state court system the denial of his application

by the administrative tribunal as a prerequisite to challenging the constitutionality of the statute in federal court. *See Public Utilities Commission v. United States*, 355 U.S. 534, 539-40, 78 S.Ct. 446, 450-51, 2 L.Ed. 2d 470 (1958). We turn to the heart of this controversy — the constitutionality of art. 5949(2).

Constitutionality of the Citizenship Requirement in art. 5949(2)

Noting that classifications based on alienage have generally been subjected to close judicial scrutiny,[1] the district court applied a "strict scrutiny" standard in judging the constitutionality of art. 5949(2) and struck down the statute because it could find no compelling state interest to uphold it. The court alternatively held that even if the constitutionality of the statute were considered under the less stringent "rational relationship" test,[2] it was unconstitutional because the "functions performed by notaries public, while aiding in the smooth operation of a multitude of day-to-day affairs, are for the most part ministerial, lacking the close relationship with governmental policymaking and discretionary concerns.... [t]he citizenship requirement in this case is wholly unrelated to the achievement of any valid state interest."

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[1] *See Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed. 2d 534 (1971)(recognizing that classifications based on alienage are "inherently suspect" and holding unconstitutional as violative of equal protection clause state statutes denying welfare benefits to resident aliens or to aliens who have not resided in the United States for a specified number of years).

[2] *See Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589, 60 L.Ed. 2d 49 (1979)(holding that public schoolteachers come within "governmental function" principle such that federal constitution requires only that a citizenship requirement applicable to teaching in public schools bears a rational relationship to a legitimate state interest); *Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed. 2d 287 (1978)(applying a rational-basis standard and holding that state could exclude aliens from becoming state troopers).

The latest word from the Supreme Court addressing the sensitive topic of state classifications dealing with aliens may be found in *Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed. 2d 677 (1982). The district court did not have the benefit of the Court's analysis in *Cabell*, as that decision was handed down by the Supreme Court subsequent to the decision here. With the advantage of the *Cabell* decision we conclude that the constitutionality of art. 5949(2) must be judged under a rational relationship test and, further, that when so judged, the constitutionality of the statue must be upheld.

In *Cabell* the Court attempted to summarize the precise contours of its previous holdings in the area of state classifications affecting aliens. In that case resident aliens were refused employment by a California county as deputy probation officers. They filed suit in federal court seeking a judgment declaring unconstitutional a California statute which required a person to be a United States citizen in order to be a peace officer or to occupy any state, county or local governmental position declared by state law to possess powers of a peace officer. A three-judge district court panel declared the California statute unconstitutional, but the Court, by a five to four vote, reversed.

Writing the majority opinion, Justice White recognized that under the Court's holdings in *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973) and other cases, "citizenship is not a relevant ground for the distribution of economic benefits, [but] it is a relevant ground for determining membership in the political community." 454 U.S. at 438, 102 S.Ct. at 739. State restrictions that affect lawfully resident aliens primarily in an economic fashion will be subject to heightened or strict judicial scrutiny. *Id.*[3] Con-

[3] *See Examining Board v. Flores de Otero*, 426 U.S. 572, 604, 96 S.Ct. 2264, 2282, 49 L.Ed. 2d 65 (1976)(Court struck down Puerto Rican law that would have denied license as a civil engineer to resident alien, noting that the right to work for a living in the common occupations of the community "'is of the very essence of

versely, strict scrutiny will not be applied when the restriction serves primarily a political function:

> "[O]ur scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives [and] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." *Sugarman v. Dougall, supra,* 413 U.S. at 648, 93 S.Ct. at 2850. We have thus "not abandoned the general principle that some state functions are so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self government." *Ambach v. Norwick*, 441 U.S. 68, 73-74, 99 S.Ct. 1589, 1593, 60 L.Ed. 2d 49 (1979). And in those areas the state's exclusion of aliens need not "clear the high hurdle of 'strict scrutiny' because that would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic value of citizenship.'" *Foley v. Connelie*, 435 U.S. 291, 295, 98 S.Ct. 1067, 1070, 55 L.Ed. 2d 287 (1978)(citations omitted).

Id. (footnote omitted).

The *Cabell* Court also explained that the *Sugarman* decision should be regarded as establishing a two-step process for determining whether a particular state restriction on legally resident aliens serves political versus economic goals:

> First, the specificity of the classification will be examined: a classification that is substantially over or

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the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure'"); *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 2d 910 (1973)(Court struck down Connecticut law restricting admission to the bar to United States citizens as violative of equal protection rights of resident aliens).

> underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends. The classification in *Sugarman* itself — all members of the competitive civil service — could not support the claim that it was an element in "the State's broad power to define its political community," 413 U.S. at 643, 93 S.Ct. at 2848, because it indiscriminately swept in menial occupations, while leaving out some of the state's most important political functions. Second, even if the classification is sufficiently tailored, it may be applied in the particular case only to "persons holding state elective or important nonelective executive, legislative, and judicial positions," those officers who "participate directly in the formulation, operation, or review of broad public policy" and hence "perform functions that go to the heart of representative government." *Id.*, at 647, 93 S.Ct. at 2850. We must therefore inquire whether the "position in question... involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." *Foley v. Connelie, supra*, 435 U.S. at 296, 98 S.Ct. at 1070.

454 U.S. at 440, 102 S.Ct. at 740 (footnote omitted). Thus, our inquiry in the present case should be whether the citizenship restriction imposed by Texas on the position of notary public serves political or economic goals, applying the two-step process described above.

Art. 5949(2) appears to satisfy the first step of the process because it is sufficiently specific — it is neither substantially over or underinclusive. The language of the statute provides that "[t]o be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United States...." The restriction imposed by that language applies *solely* to persons seeking appointment as a notary public, and has no effect on or application to persons seeking appointment to any

other state office or position. Thus, if anything, the Texas statute is much more precisely drafted[4] or "sufficiently tailored" than the California statute in *Cabell* — which defined the term "peace officer" to include over 70 different state jobs, ranging from dental board inspectors to park rangers to harbor police to welfare fraud investigators. Despite the seemingly overinclusiveness of the California statute (because of its effect on so many different kinds of state jobs), the *Cabell* Court found that the citizenship restriction there did not reach so far and so broad "as to belie the state's claim that it is only attempting to ensure that an important function of government be in the hands of those having the 'fundamental legal bond of citizenship.'" 454 U.S. at 442, 102 S.Ct. at 741.

The second step presents this question: Does a notary public in Texas exercise discretion in making decisions which substantially affect members of the political community? Whatever may be thought about the prestige of the office, the importance of the consequences of the official acts of the notary public to the government and courts of the state cannot be denied. The revised civil statutes of Texas contain many references to their deeds and duties. Art. 5954 grants this authority:

> Notaries Public shall have the same authority to take acknowledgements or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions, as is now or may hereafter be conferred by law upon County Clerks. . . .

In the stated areas, they possess authority identical to county clerks. With the power to acknowledge instruments such as wills and deeds and leases and mortgages; to take out-of-court

[4] The Court explained in *Cabell* that a state classification need not be "precise," but is sufficiently tailored to withstand a facial challenge to its constitutionality if it is merely a "substantial fit." 454 U.S. at 442, 102 S.Ct. at 741.

depositions; to administer oaths; and the discretion to refuse to perform any of the foregoing acts, notaries public in Texas are involved in countless matters of importance to the day-to-day functioning of state government. The Texas political community depends upon the notary public to insure that those persons executing documents are accurately identified, to refuse to certify any identification that is false or uncertain, and to insist that oaths are properly and accurately administered. Land titles and property succession depend upon the care and integrity of the notary public, as well as the familiarity of the notary with the community, to verify the authenticity of the execution of documents.

Notaries certify to acknowledgements (art. 6602) of conveyances which admit the instruments to public record (art. 6626), and which record may in turn be the only evidence of authenticity if the original document is unavailable. (arts. 3726, 3726a). Wills signed and attested by the testator and two witnesses, if identified and sworn by a notary public, may be admitted to probate without any supporting proof. (Probate Code §§ 59, 84). The acknowledgements of notaries are admissible evidence of the facts recited therein. (arts. 3723, 6602). There are numerous instances where affidavits are required to insure accuracy and gravity of declarations, all depending in some measure upon the notary public who administers the oath; for example, suits on sworn account, judicially admissible business records and medical x-rays (art. 3737e) and recorded affidavits of heirship (art. 3726a). The courts of Texas give evidence and weight to the certificate of a notary public. "To impeach a notary's certificate, it has been held that the evidence must be clearly cogent and convincing beyond any reasonable controversy. *Griffin v. Stewart*, 348 S.W.2d 800 ([Tex.] Civ. App. [1961] n.w.h.)." *Hall v. Hayes*, 441 S.W.2d 275, 277 (Tex. Civ. App. — El Paso 1969, no writ).

We conclude that the office of a notary public in Texas is not a mere job or source of income, and that it is comparable

to the positions of school teacher and police and probation officers in importance to the functioning of state government. The notary public may symbolize the power of the political community when administering a solemn oath or demanding certain proof of identity for the execution of a formal document. The citizenship restriction in art. 5949(2) bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state. Because Texas has a valid interest and right to define for itself the qualifications for the position of notary public, and because a citizenship requirement does not impermissibly violate equal protection guarantees in these circumstances, we uphold the constitutionality of art. 5949(2).

REVERSED.

INGRAHAM, Circuit Judge, concurring in part and dissenting in part:

I concur with much of the majority opinion, but I must respectfully dissent from its holding that Tex. Rev. Civ. Stat. Ann. art. 5949(2) is constitutional. I agree that the issues appear to have become moot with respect to Vargas and that they remain alive with respect to Bernal. Further, I agree that Bernal was not required to exhaust administrative remedies. I disagree, however, with the majority's conclusion that the district court erred in applying the strict scrutiny standard to determine the constitutionality of the statute. Therefore, with deference, I must respectfully dissent in part.

The responsibilities and duties of a notary public in Texas are more akin to the authority granted Connecticut lawyers, *see In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed. 2d 910 (1973), than the plenary powers given peace officers, *see Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S.Ct. 735, 70 L.Ed. 2d 677 (1982), state troopers, *see Foley v. Connelie*, 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed. 2d 287 (1978), or school teachers. *See Ambach v. Norwick*, 441 U.S. 68, 99 S.Ct. 1589,

60 L.Ed. 2d 49 (1979). As the Supreme Court noted, "a [Connecticut] lawyer has authority to 'sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgments of deeds.'" *In re Griffiths*, 413 U.S. at 723, 92 S.Ct. at 2855 (quoting Conn. Gen. Stat. Rev. § 51-85). Thus, the authority accorded Connecticut lawyers encompasses every function performed by Texas notaries public. *See supra* at 5972. The Supreme Court, however, has stated that "[i]t in no way denigrates a lawyer's high responsibilities to observe that [these duties] hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." *Id.* at 724, 93 S.Ct. at 2856. Because the Supreme Court has held that states cannot require citizenship of lawyers, a profession whose responsibilities and duties comprehend more than those of the Texas notary public, I would apply the analysis of *In re Griffiths* to hold art. 5949(2) unconstitutional.

Despite the clear language in *Griffiths* declaring that the functions of notaries public are not of the character that justifies excluding noncitizens, the majority attempts to distinguish the present case as representing a political function and therefore subject to a less demanding standard of review. This lower standard is permissible when the classification applies to a political office only because of "the recognition of the fact that a democratic society is ruled by its people . . . [and the requirements that a political officer be a citizen] represents the choice, and right, of the people to be governed by their citizen peers." *Foley*, 435 U.S. at 296, 98 S.Ct. at 1071. The issue then becomes whether notaries public are governing officers. The Supreme Court clarified this inquiry in *Cabell* by stating that the classification could be applied only "'to persons holding state elective or important nonelective executive, legislative, and judicial positions,' those officers who 'participate directly in the formulation, operaton, or review of broad public policy' and hence 'perform functions that go to the heart of representative govern-

ment.'" *Cabell*, 454 U.S. at 440, 102 S.Ct. at 740 (quoting from *Sugarman v. Dougall*, 413 U.S. 634, 93 S.Ct. 2842, 37 L.Ed. 2d 853 (1973). The Supreme Court goes on to state that "[w]e must therefore inquire whether the 'position in question . . . involves discretionary decisionmaking or execution of policy, which substantially affects members of the political community.'" *Id.* 454 U.S. at 441, 102 S.Ct. at 740 (quoting *Foley*, 435 U.S. at 296, 98 S.Ct. at 1070).

The majority, however, restates this inquiry as "Does a notary public in Texas exercise discretion in making decisions which substantially affect members of the political community?" *Supra* at 5972. This reformation focuses on whether notaries exercise any discretion in making the decisions associated with their duties rather than whether their duties involve discretionary decisionmaking or execution of policy, which would reveal a governing role. Accordingly, the majority emphasizes the importance of notaries in the proper and orderly handling of legal documents and their role in the smooth functioning of the state government. Nevertheless, this shifted focus illustrates the clerical nature of the duties of notaries public.

Moreover, when we examine the duties of Texas notaries to determine whether they involve discretionary decisionmaking or execution of policy, we find that notaries perform purely ministerial functions. Unlike the peace officers in *Cabell* or the state troopers in *Foley*, notaries public do not "partake of the sovereign's power to exercise coercive force over the individual." *Cabell*, 454 U.S. at 445, 102 S.Ct. at 743. Neither do notaries exercise the wide discretion enjoyed by teachers in presenting course materials that "inculcat[e] [the] fundamental values necessary to the maintenance of a democratic political system." *Ambach*, 441 U.S. at 77, 99 S.Ct. at 1594. Instead, the responsibility of the notary public is "to insure that those persons executing documents are accurately identified, to refuse to certify any identification that is false or uncertain, and to insist that oaths are properly and

accurately administered." *Supra* at 5973. While the accurate and consciencious performance of these duties are important for the smooth functioning of the state government, they do not "involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." *Griffiths*, 413 U.S. at 724, 93 S.Ct. at 2856.

Accordingly, I would affirm the district court decision holding Tex. Rev. Civ. Stat. art. 5949(2) unconstitutional.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2457

D.C. Docket No. B-79-147

MARGARITA M. VARGAS and
EFREM BERNAL, Etc.,

Plaintiffs-Appellees,

versus

GEORGE W. STRAKE, JR.,
Etc., ET AL.,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before INGRAHAM, REAVLEY and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

IT IS FURTHER ORDERED that plaintiffs-appellees pay to defendants-appellants the costs on appeals to be taxed by the Clerk of this Court.

July 25, 1983

INGRAHAM, Circuit Judge, concurring in part and dissenting in part.

Issued as Mandate: AUG 16 1983.

Office - Supreme Court, U.S.
FILED
NOV 17 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-630

IN THE
SUPREME COURT OF THE UNITED STATES

EFREM BERNAL,

Petitioner,

V.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas and SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant

LOU McCREARY
Chief, State & County Affairs

FERNANDO C. GOMEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Respondents

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals Properly Apply the Rational Basis Test in Upholding a Texas Statute Prohibiting An Alien from Holding the Office of Notary Public?

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NO. 83-630

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Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

NOW COMES THE State of Texas, and files this Opposition to Petition for Writ of Certiorari filed by Petitioner.

SUMMARY OF ARGUMENT

Petitioner has challenged the constitutionality of Texas Revised Civil Statutes Annotated, Article 5949(2), which prohibits non-citizens from holding the Office of Notary Public. Finding Notaries Public hold an important non-elective office, the Fifth Circuit Court of Appeals properly applied the rational basis test in upholding the statute. Because the Court of Appeals did not err in following prior decisions of this Court on the same subject, because the statute protects an important political function of the State, this Court should not grant the petition for certiorari.

ARGUMENT

THE FIFTH CIRCUIT'S DECISION IS CONSISTENT WITH PRIOR OPINIONS OF THIS COURT ON THE SAME SUBJECT.

The petition for writ of certiorari should be denied because this Court has already clearly stated its view that strict scrutiny is not required to uphold a state alienage restriction protecting an important political function. The petition should also be denied because the Fifth Circuit's decision is consistent with this Court's prior opinions on the same subject.

Placing principal reliance upon *In re Griffiths*, 413 U.S. 717 (1973), Petitioner asserts that the Fifth Circuit's decision conflicts with relevant opinions of this Court. Objecting to the Fifth Circuit's "relegation" of *In re Griffiths* to a footnote, Petitioner fails to address this Court's most recent decision on the subject, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), the authority upon which the Fifth Circuit principally relied in making its decision.

In *Cabell*, this Court recognized that, under the Court's holdings in *Sugarman v. Dougall*, 413 U.S. 634 (1973), and other cases, citizenship is "a relevant ground for determining membership in the political community," 454 U.S. at 438, and that strict scrutiny will not be applied when the restriction serves primarily a political function. *Sugarman v. Dougall, supra*, 413 U.S. at 648.

In re Griffiths, supra, invalidated a statute precluding aliens from working as lawyers. The state had tried to transubstantiate lawyers into officials of government because the statute fortuitously made every lawyer a "commissioner of the Superior Court" and authorized him or her "to sign writs and subpoenas, take recognizances, [and] administer oaths." 413 U.S. at 724. Properly viewed, Griffiths is merely one of this Court's long line of cases

advancing an alien's "right to work for a living in the common occupations of the community." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

This Court has clearly drawn the line of demarcation for level of scrutiny required to uphold a state restriction based upon alienage. Strict scrutiny is required when such restrictions strike "at the noncitizens' ability to exist in the community." *Foley v. Connelie* 435 U.S. 291, 295 (1978). Thus, absent a compelling reason, aliens may not be excluded from working in the laundry business, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); from obtaining commercial fishing licenses, *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948); from access to educational benefits, *Nyquist v. Mauclet*, 432 U.S. 1 (1977); from a broad range of public employment, *Sugarman v. Dougall*, 413 U.S. 634 (1973); from the practice of licensed professions, *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); or from the practice of law, *In re Griffiths, supra.*

Petitioner does not, indeed cannot, assert any such economic interest. In his deposition below, Petitioner testified that he continued to be gainfully employed and that he would have occasion to exercise the powers of a Notary Public only two to four times a month. Petitioner further observes that a minority of other states have statutes requiring United States citizenship for being licensed as a notary. However, the record does not reflect the existence of even one other non-citizen notary in Texas or in the country who would suffer the dire economic consequences suggested by Petitioner if this Court denies certiorari.

Moreover, since the subject restriction serves primarily a political function, the *Sugarman v. Dougall*, 413 U.S. 634 (1973), test is triggered; and the restriction: 1) must not be "substantially over or under inclusive"; and 2) even if sufficiently tailored, it must be limited to "state elective or important nonelective" positions. *Cabell v.*

Chavez—Salido, supra, 454 U.S. at 440. Petitioner's sole contention is that the office of Notary Public in Texas is not important enough to warrant application of the rational basis standard of review.

Properly applying Sugarman and Cabell, and after examining the functions of Notaries Public in the State of Texas, the Court of Appeals disagreed.

Examination of the function of Notaries Public in Texas government illustrates that such officials directly participate in the *operation or execution* of policy, "which substantially affects members of the political community." *Cabell v. Chavez—Salido, supra*, 454 U.S. at 441. Notaries Public bear the State's Seal, indicative of the sovereign power of government. No one, not even a citizen, has an absolute right to be a Notary Public. So important was the Notary's function in Texas history that, until 1939, confirmation by the State Senate was required to hold the office. See Article 5949, historical note, Vernon's Texas Civil Statutes. In certain areas, Notaries possess power co-extensive with that of County Clerks (art. 5954). *Inter alia*, Notaries certify to acknowledgments (art. 6602) of conveyances which admit the instruments to public record (art. 66236); by the mere stroke of a pen, they wield power to cause wills to be admitted to probate without supporting proof (Probate Code, §§ 59, 84); and they take out-of-court depositions and administer oaths, including oaths of admission to the practice of law.

As suggested by the Fifth Circuit, "[t]he notary public may symbolize the power of the political community" bearing "a rational relationship to the state's interest in the proper and orderly handling of documents and other business of importance to the State." See Petitioner's Appendix, p. 24a. The State respectfully reserves the right to delegate this portion of its sovereign power to those who have elected participation in the process of

democratic government by swearing allegiance of citizenship. As this Court succinctly stated in *Foley v. Connelie, supra*, 435 U.S. at 297, "the right to govern is reserved to citizens."

Finally, Petitioner suggests that the Court of Appeals erred in applying *Sugarman* because Notaries Public are not government employees (but usually private individuals) and hence do not hold important public office. However, this Court has explicitly abandoned the interpretation urged by Petitioner: "This distinction between the economic and political functions of government has, therefore, replaced the old public/private distinction." *Cabell v. Chavez—Salido, supra*, 454 U.S. at 440. In Texas, Notaries Public are public officials, a fact properly recognized by the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant

LOU McCREARY
Chief, State & County Affairs

DAVID R. RICHARDS
Executive Assistant
Attorney General

Attorneys for Respondents,
John W. Fainter, Jr., Secretary
of State of the State of Texas,
Joe Rivera, County Clerk for
Cameron County, Texas and
Santos Saldana, County Clerk for
Hidalgo County, Texas

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition to Petition for Writ of Certiorari has been sent via U.S. Mail, certified, return receipt requested on this the 16th day of November, 1983 to Mr. Thomas Sullivan and Denis A. Downey, DOWNEY & SULLIVAN, 1185 F.M. 802, Suite 3, Brownsville, Texas 78520, to Mr. Cornish F. Hitchcock (Counsel of Record), Mr. Alan B. Morrison and Mr. John Cary Sims, PUBLIC CITIZENS LITIGATION GROUP, Suite 700, 2000 P Street, NW, Washington, D.C. 20036, Attorneys for Petitioner.

David R. Gray

for DAVID R. RICHARDS
Executive Assistant
Attorney General

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No. 83-630

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

EFREM BERNAL,

Petitioner,

v.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas, and, SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

THOMAS SULLIVAN
DENIS A. DOWNEY

Downey & Sullivan
1185 F.M. 802, Suite 3
Brownsville, Texas 78520
(512) 544-0561

CORNISH F. HITCHCOCK
(Counsel of Record)
ALAN B. MORRISON
JOHN CARY SIMS

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

January 1984

Attorneys for Petitioner

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

QUESTION PRESENTED*

May a state constitutionally deny all resident aliens the opportunity to become notaries public, while under *In re Griffiths*, 413 U.S. 717 (1973), qualified resident aliens cannot be denied admission to the bar or be denied the right to administer oaths and perform other functions similar to those carried out by notaries public?

---

* In addition to the parties identified in the caption, Margarita M. Vargas was a plaintiff-appellee below. Pursuant to Rule 40.3 of the Rules of this Court, respondent John W. Fainter, Jr., Secretary of State of the State of Texas, is automatically substituted for his predecessor in office George W. Strake, Jr.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-630

EFREM BERNAL,

Petitioner,

v.

JOHN W. FAINTER, JR., Secretary of State of the State of Texas, JOE RIVERA, County Clerk for Cameron County, Texas, and, SANTOS SALDANA, County Clerk for Hidalgo County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

REFERENCE TO OPINIONS

The unreported opinion of the United States District Court for the Southern District of Texas, Brownsville Division, is reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at pages 5a-13a. The judgment is reproduced at Pet. App. 14a.

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 15a-27a) is reported at 710 F.2d 190 (1983) under the name *Vargas v. Strake.*

JURISDICTION

The judgment of the court of appeals was entered on 25 July 1983 (Pet. App. 27a-28a). The petition for certiorari was timely filed on 14 October 1983 and was granted on 5 December 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, states in pertinent part:

> . . . No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Texas Revised Civil Statutes Annotated article 5949(2) (1982) states in pertinent part:

> To be eligible for appointment as a Notary Public, a person shall be a resident citizen of the United States and of this state and at least eighteen(18) years of age . . ..

STATEMENT OF THE CASE

This case was filed as a class action on 5 July 1979 by Margarita M. Vargas, who was then a citizen of Mexico, to challenge the constitutionality of Tex. Rev. Civ. Stat. Ann. art. 5949(2) insofar as it requires a person to be a citizen of the United States in order to be eligible for appointment as a notary public in Texas. Jurisdiction was properly based on 28 U.S.C. §§ 1331, 1343(a)(3) and (4).

When the complaint was filed, Vargas was a lawful resident alien who worked as a secretary/receptionist in a real estate office in Brownsville. She wished to become a notary public so that she could administer oaths and take sworn statements from clients of her office. While the case was pending in district court, she became a United States citizen and therefore became eligible to become a notary public. This case is thus moot as to her (Pet. App. 3a).

Petitioner Efrem Bernal, a native of Mexico, was added as a plaintiff in the district court (Pet. App. 16a). He is a lawful resident alien who has been living in the United States since 1961. *Id.; see also* Deposition of Efrem Bernal ("Bernal Deposition"), filed in district court, at 8. After his arrival in this country, he attended public schools in Texas and graduated from high school there (Pet. App. 2a). From 1974 to 1978 he was employed in a migrant legal services program in Indiana, and during those four years he held a commission as a notary public in that state (Pet. App. 2a.)[1] Since 1978 he has been employed as a paralegal by Texas Rural Legal Aid, Inc. in Edinburg (Pet. App. 2a; Bernal Deposition at 19), where he works exclusively with migrant farm workers on employment and civil rights issues (Bernal Deposition at 6). His job requires that he go into the fields and interview 15 to 50 farm workers a month (*id.* at 12-13). On an average of two to four times each month, he needs to obtain sworn statements from these workers for use in civil litigation (*id.* at 13). He wants to become a notary public because it is "very hard and inconvenient to get one of the other paralegals to go out with me to just get an affidavit or statement notarized" (*id.* at 8; *see also* Pet. App. 3a-4a).[2]

[1] The Indiana notary statute under which Mr. Bernal was commissioned during this period embraces all the functions which he would perform as a Texas notary. *See* Burn's Ind. Stat. Ann. § 33-16-2-5 (1975).

[2] Mr. Bernal's situation recalls one of the historical reasons why the authority of notaries to serve the public was expanded. "In the 1800's, it was not always possible to take the testimony of a witness in a courtroom. Transportation was slow and witnesses were often incapable of making an appearance for reasons of distance or, in some cases, health. Therefore, Notaries Public were empowered to take depositions." R. Rothman, *Notary Public: Practices and Glossary* 3-4 (1978).

Respondent John W. Fainter, Jr. is Secretary of State of the State of Texas and is automatically substituted for his predecessor, George W. Strake, Jr., pursuant to Rule 40.3 of the Rules of this Court. Respondents Joe Rivera and Santos Saldana are the county clerks for Cameron County (where Mrs. Vargas resides) and Hildago County (where Mr. Bernal resides), respectively. The respondents will be referred to collectively in this brief as the "State of Texas" or the "State." At the time that this suit was filed, the Texas notary public statute required applicants to submit a standardized form to the local county clerk, who then forwarded it to the Secretary of State for consideration (Pet. App. la). Since then, the statute has been amended to make the Secretary of State solely responsible for processing such applications. *See* 1979 Tex. Gen. and Special Acts, 66th Legis., p. 2213, ch. 840, § 1, *codified at* Tex. Rev. Civ. Stat. Ann. art. 5949(3)(effective 1 January 1980).

In October 1978, petitioner applied to become a notary public in Texas, but his application was denied (Pet. App. 2a-3a). He appealed that decision and was given an administrative hearing, but the denial was upheld on the sole ground that he was ineligible for appointment as a notary public because of the citizenship requirement in Tex. Rev. Civ. Stat. Ann. art. 5949(2)(Pet. App. 3a).

In district court, the request for class relief was abandoned (Pet. App. 5a), and the request of Mrs. Vargas and Mr. Bernal for declaratory and injunctive relief was submitted on the basis of stipulated facts (Pet. App. 1a- 4a). On 9 October 1981 the district court declared that the citizenship requirement of Tex. Rev. Civ. Stat. Ann. art. 5949(2) was unconstitutional as a denial of the equal protection of the laws, and the court enjoined respondents from refusing to consider the applications of Mrs. Vargas and Mr. Bernal to become notaries public (Pet. App. 9a-11a).

The State appealed, and the court of appeals reversed in an opinion by Judge Reavley in which Judge Politz joined (Pet. App. 15a-24a). The court held that the statute did not violate equal protection guarantees because, under this Court's opinion in *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982), the citizenship requirement "bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state" (Pet. App. 24a). Judge Ingraham dissented (Pet. App. 24a-27a). In his view, the majority had misread *Cabell*, and the case was controlled by *In re Griffiths*, 413 U.S. 717 (1973), which invalidated a ban on the admission of aliens to the Connecticut bar (Pet. App. 25a). In particular, he noted that "the authority accorded Connecticut lawyers encompasses every function performed by Texas notaries public" (Pet. App. 25a), and he would have affirmed on that basis. Mr. Bernal then sought and obtained review by this Court.

SUMMARY OF ARGUMENT

The judgment of the court of appeals should be reversed because it conflicts with *In re Griffiths*, 413 U.S. 717 (1973), which employed strict scrutiny analysis in striking down a court rule requiring United States citizenship as a condition for being admitted to a state bar. In *Griffiths*, this Court confronted arguments similar to those advanced by the State here, *i.e.*, that lawyers play such an important role in the smooth functioning of state government that the citizenship requirement should be upheld. In rejecting these arguments and holding the rule unconstitutional, the Court stated that "the status of having a license to practice law [does not] place one so close to the core of the political process as to make him a formulator of government policy," *id.* at 729 (footnote omitted).

Especially relevant here is the fact that the functions performed by Texas notaries are indistinguishable from certain notarial functions entrusted to Connecticut lawyers in *Grif-*

fiths. In language which controls the outcome here, *Griffiths* stated that "the powers 'to sign writs and subpoenas, take recognizances, [and] administer oaths' hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." 413 U.S. at 724. In light of the similarities between *Griffiths* and the present case, the Texas statute cannot withstand strict scrutiny.

The court of appeals failed to analyze *Griffiths,* relying instead on this Court's opinion in *Cabell v. Chavez-Salido,* 454 U.S. 432 (1982), which stated that strict scrutiny was not to be utilized in cases where a restriction applies to sensitive posts in state or local government and thus serves "political" interests, rather than "economic" interests, as in *Griffiths.* The court of appeals concluded that the Texas statute served "political" interests and upheld the citizenship requirement as being rationally related to the State's interest in assuring that documents are properly notarized and oaths properly administered.

In reaching this conclusion, however, the court of appeals misapplied *Cabell*'s two-part test for determining which functions should be deemed "political." The court found that the Texas statute was not "substantially overinclusive or underinclusive" (454 U.S. at 440) within the meaning of the first prong of *Cabell,* because the restriction applied only to notaries public. However, the statute is overinclusive because, as in *Griffiths,* it excludes qualified aliens, such as petitioner, who was a notary in Indiana for four years. The restriction is fatally underinclusive as well, since Texas has established no citizenship requirement for court reporters, even though they too are licensed by the State and are allowed to administer oaths. Nor does Texas require citizenship of its Secretary of State, the highest appointed official in Texas, who performs many important functions, including licensing notaries.

The court of appeals also found that the statute met the second prong of *Cabell,* because it covered persons holding

"important nonelective" positions. *Id.* This conclusion is incorrect because notaries perform essentially ministerial functions and do so while engaged in a private occupation. This case is thus unlike those cases in which restrictions have been deemed "political" because they denied aliens the right to exercise important state functions as employees of a state or local government.

Finally, even if the Texas statute were to be deemed to involve "political" functions, it is still unconstitutional because there is no rational relationship between the blanket exclusion of aliens and achieving the State's goal of having documents properly notarized and oaths properly administered. The restriction is not rational in light of the types of positions which aliens are allowed to hold in Texas state government, as discussed *supra.* In addition, the State has enacted various regulations which should assure that notaries perform their functions properly, regardless of citizenship.

ARGUMENT

THE REQUIREMENT THAT NOTARIES PUBLIC BE UNITED STATES CITIZENS IS UNCONSTITUTIONAL AS A DENIAL OF THE EQUAL PROTECTION OF THE LAWS.

A. The Applicable Legal Standard.

Over the past decade, this Court has considered a number of equal protection challenges to state restrictions on lawful resident aliens. In *Graham v. Richardson,* 403 U.S. 365 (1971), the Court held that a state could not distinguish between lawful resident aliens and citizens in distributing welfare benefits without meeting a very heavy burden of justification:

> [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny.

> Aliens as a class are a prime example of a "discrete and insular" minority (*see United States v. Carolene Products Co.*, 304 U.S. 144, 152-153 n.4 (1938)) for whom such heightened judicial solicitude is appropriate.

403 U.S. at 372 (footnotes omitted).[3]

This strict scrutiny of classifications involving aliens has been employed in various contexts because aliens, like certain other groups in our society, "have historically been 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982), *quoting San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). *See* Note, *A Dual Standard for State Discrimination Against Aliens*, 92 Harv. L. Rev. 1516, 1525 (1979).

Following *Graham*, the Court has applied strict scrutiny to state laws which disadvantaged aliens economically by

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[3] In *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court first held that resident aliens may rely upon the equal protection clause of the Fourteenth Amendment. It concluded that a state could not deny aliens the right to carry on a "harmless and useful occupation" that may be performed by citizens, *id.* at 374, in that case the operation of commercial laundries. *Accord, Truax v. Raich*, 239 U.S. 33 (1915)(invalidating statute requiring private employers to hire a certain percentage of "qualified electors or native-born citizens").

The early decisions of the Court thus showed a willingness to intervene when state laws restricted purely private employment opportunities. However, the Court declined to strike down restrictions denying aliens the right to enjoy public benefits, reasoning that a state could properly limit to its citizens the enjoyment of scarce public resources. *See, e.g., Terrace v. Thompson*, 263 U.S. 197 (1923) (ownership of land); *Heim v. McCall*, 239 U.S. 175 (1915)(employment on public works projects); *Patsone v. Pennsylvania*, 232 U.S. 139 (1914)(taking of wild game).

The notion that a state has a "special public interest" in preserving certain benefits or resources for its citizens was undercut in *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948), which invalidated a California law denying commercial fishing licenses to persons "ineligible to citizenship." The "special public interest" doctrine was effectively laid to rest in *Graham v. Richardson*.

depriving them of employment opportunities and of some state benefits. Thus, the Court has struck down state laws denying aliens admission to a state bar, *In re Griffiths,* 413 U.S. 717 (1973); jobs in a state's civil service, *Sugarman v. Dougall,* 413 U.S. 634 (1973); a license as a civil engineer, *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero,* 426 U.S. 572 (1976); and eligibility to receive a state scholarship for higher education, *Nyquist v. Mauclet,* 432 U.S. 1 (1977).

The Court has, however, carved out an exception to this general rule of strict scrutiny when state laws prevent aliens from holding sensitive posts in state or local government. Thus, even though a wholesale ban on aliens holding civil service posts was struck down in *Sugarman v. Dougall, supra,* this Court stated that a less demanding standard would be applied to narrower classifications involving "persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy functions that go to the heart of representative government." 413 U.S. at 647. If a classification involves such an important post, the state needs "to justify its classification only 'by a showing of some rational relationship between the interest sought to be protected and the limiting classification.'" *Ambach v. Norwick,* 441 U.S. 68, 74 (1979), *quoting Foley v. Connelie,* 435 U.S. 291, 296 (1978). The Court has applied this less rigorous standard to classifications which barred aliens from serving as police officers, *Foley v. Connelie, supra;* public school teachers, *Ambach v. Norwick, supra;* and peace officers, *Cabell v. Chavez-Salido, supra,* and has upheld the restriction in each case under this "rational relationship" test.[4]

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[4] In addition, aliens have been excluded from voting in local elections, *Skafte v. Rorex,* 430 U.S. 961 (1977), *dismissing appeal from* 191 Colo. 399, 553 P.2d 830 (1976), and from serving on grand and petit juries, *Perkins v. Smith,* 426 U.S. 913 (1976), *aff'g mem.,* 370 F. Supp. 134 (D. Md. 1974)(three-judge court).

In *Cabell v. Chavez-Salido, supra,* the Court summarized the evolution of the law in this area and articulated a two-step standard for use in determining whether strict scrutiny should not be employed because a restriction on aliens falls within the *Sugarman* exception and serves what the Court termed "political" ends, as in *Foley* and *Ambach,* rather than "economic" goals, as in *Griffiths, Sugarman* and *Flores de Otero.* 454 U.S. at 438-39. First, a classification that is "substantially overinclusive or underinclusive tends to undercut the governmental claim that the classification serves legitimate political ends." *Id.* at 440. Second, even if a classification is "sufficiently tailored," it may be applied only to officials holding "important" positions of the sort specified in the *Sugarman* exception. *Id.* Thus, a court must "inquire whether the 'position in question . . . involves discretionary decisionmaking, or execution of policy, which substantially affects members of the political community.'" *Id.* at 440-41, *quoting Foley v. Connelie, supra,* 435 U.S. at 296.

In the balance of this brief, we will first demonstrate why the restriction in this case is so similar to the restriction invalidated under strict scrutiny analysis in *In re Griffiths, supra,* that *Griffiths* is controlling. We will then demonstrate how this result is consistent with *Cabell* and how the court of appeals misapplied *Cabell* in concluding that this classification served "political" ends and was therefore subject to less searching review than strict scrutiny. Finally, we will demonstrate why, even if the Texas classification is considered to be "political," there is no rational relationship between the restriction and the state interests sought to be protected.

B. The Texas Statute Cannot Withstand Strict Scrutiny Under *In re Griffiths.*

The judgment of the court of appeals should be reversed because it squarely conflicts with *In re Griffiths,* in which this

Court invalidated a Connecticut court rule barring aliens from admission to the state bar. The Court found that the citizenship requirement could not withstand strict scrutiny because the functions of lawyers "hardly involve matters of state policy or acts of such major responsibility as to entrust them only to citizens." 413 U.S. at 724.

In reaching its decision, the Court recognized that lawyers "occupy professional positions of responsibility and influence that impose on them duties correlative with their vital right of access to the courts." *Id.* at 729. *Accord, Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975) ("lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'"), *quoted in In re Primus,* 436 U.S. 412, 422 (1978). *See also Cohen v. Hurley,* 366 U.S. 117, 123-24 (1961). The Court nonetheless held that "the status of holding a license to practice law [does not] place one so close to the core of the political process as to make him a formulator of government policy," *Griffiths, supra,* 413 U.S. at 729 (footnote omitted).

What is especially significant for the present case is the fact that the functions performed by Texas notaries are indistinguishable from the functions performed by Connecticut lawyers as Commissioners of the Superior Court, an office to which they are automatically appointed upon admission to the bar. In that capacity, they are empowered to "sign writs and subpoenas, take recognizances, administer oaths and take depositions and acknowledgements of deeds." Conn. Gen. Stat. Rev. § 51-85. Similarly, Texas notaries public "have the same authority to take acknowledgements or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions as is now or may hereafter be conferred by law upon County Clerks." Tex. Rev. Civ. Stat. Ann. art. 5954. In light of these similarities and the fact that *Griffiths* was recently reaffirmed in *Cabell, supra,* 454 U.S. at 439, the State has the burden of showing how it can be constitutionally improper to require citizenship

for lawyers, but proper to require it for notaries. This the State has failed to do.

In defending its restriction in *Griffiths*, the State of Connecticut advanced an argument about the importance of lawyers which is similar to that raised by the State of Texas regarding notaries (*see* Brief in Opposition at 4-5) — that a lawyer is a public official "who acts by and with the authority of the State" and who is entrusted with "the exercise of actual government power," 413 U.S. at 728. In particular, Connecticut argued that its legislature had given concrete meaning to the claim that lawyers are "officers of the court" by appointing them as Commissioners of the Superior Court. *Id.* The fact that lawyers hold this office was not enough, however, to sustain the citizenship requirement in *Griffiths*. In language which is pertinent here, this Court stated:

> It in no way denigrates a lawyer's high responsibilities to observe that the powers "to sign writs and subpeonas, take recognizances, [and] administer oaths" *hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens.*

413 U.S. at 724 (emphasis added).

The Court emphasized that "a lawyer is not an officer in the ordinary sense," for unlike marshals, bailiffs, court clerks or judges, who are employed by the government, "a lawyer is engaged in a private profession, important though it be to our system of justice." *Id.* at 728-29, *quoting Cammer v. United States*, 350 U.S. 399, 405 (1956). In addition, people do not become "officials of government by virtue of being lawyers." *Id.* at 729. This reasoning applies with equal force to notaries, who, like lawyers, are licensed to perform certain functions, but who generally do so while privately employed.

Nor was the *Griffiths* Court persuaded that the restriction was valid because aliens might somehow be disloyal to the United States. Noting that attorneys must take an oath to support the United States and state constitutions, *id.* at 725-26, and are subject to "continuing scrutiny by the organized bar and the courts," *id.* at 727, the Court concluded that "the practice of law [does not offer] meaningful opportunities adversely to affect the interest of the United States. Certainly the Committee has failed to show the relevance of citizenship to any likelihood that a lawyer will fail to protect faithfully the interest of his clients." *Id.* at 724 (footnote omitted).

Griffiths controls the outcome here. Certainly, if citizenship is not required in order to practice law, it should not be required in order to be a notary. Indeed, accepting the State's argument would result in a curious anomaly: an alien admitted to practice law in Texas could draft contracts, wills, deeds and other important legal documents, but could not notarize them. Such a result would make no sense, especially since the lawyer who drafts (or errs in drafting) a will or a deed has a far more significant impact on the public and the "orderly processing of a countless variety of legal documents" (Pet. App. 24a) than the notary who simply attests to the signature.

Curiously, the court of appeals failed to discuss *Griffiths* and merely cited the case in a footnote (Pet. App. 20a n.3). Nor did the court mention three decisions which followed *Griffiths* in striking down citizenship requirements for notaries in Florida, Illinois and Maryland. *See Graham v. Ramani,* 383 So. 2d 634 (Fla. 1980); *Cheng v. Illinois,* 438 F. Supp. 917 (N.D. Ill. 1977); *Taggart v. Mandel,* 391 F. Supp. 732 (D. Md. 1975)(three-judge court). As the foregoing discussion suggests, however, *Griffiths* cannot be sidestepped so easily.

Applying the strict scrutiny analysis of *Griffiths* to the Texas statute at issue here dictates a finding of unconstitutionality. There is no evidence in the record that lawful resi-

dent aliens, as a class, are so untrustworthy, incompetent or otherwise handicapped by their foreign citizenship that they must be denied the opportunity to administer oaths, witness signatures and perform the other functions carried out by notaries public for those who wish to utilize their services. As the Court recognized in *Griffiths*, "the possibility that some resident aliens are unsuited to the practice of law [cannot] be a justification for a wholesale ban," 413 U.S. at 725.[5]

This is not to say that a state is powerless to regulate the qualifications and performance of notaries public. Just as was true of Connecticut lawyers in *Griffiths*, a state "has wide freedom to gauge on a case-by-case basis the fitness of an applicant" for a particular post and to "require appropriate training and familiarity with state laws." *Id.* In fact, Texas has imposed a number of regulations on persons who wish to be licensed as notaries. Tex. Rev. Civ. Stat. Ann. art. 5949(3). For example, as a means of assuring loyality to the United States, as well as faithful performance once in office, Texas notaries public take an oath of office and execute a bond of $2500 (art. 5949(7)). So that their activities can be monitored, they are required to maintain a record book, which is available for public inspection (art. 5955). In addition, they are subject to civil liability for damages for any derelictions of their official duties. *See Lawyers Surety Corp. v. Gulf Coast Investment Corp.*, 410 S.W.2d 654 (Tex. Civ. App.), *writ of error refused*, 416 S.W.2d 779 (Tex. 1967).[6]

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[5] Ironically, petitioner was commissioned as a notary public by the State of Indiana and held that post during the four years he lived there (Pet. App. 2a).

[6] As another form of consumer protection, Texas notaries who advertise their services in Spanish cannot describe themselves as "Notario Publico" or represent that they can give legal advice (art. 5949(5)(c)). The purpose of this law is to prevent people from thinking that a Texas notary is comparable to a Notario Publico in Mexico, who must be trained in the law and can not only witness legal documents, but can draft them as well. Violation of this disclosure requirement is punishable as an unfair trade practice (art. 5949(5)(d)). *See* Mexico Notarial Law of 9 January 1932; Law of 30 December 1947, as amended by Decrees of 21 December 1950; 21 December 1965 and 26 December 1966, *summarized in* Mex-

Finally, notaries are automatically removed from office if they are convicted of "any willful neglect of duty or official misconduct" (art. 5988). *See generally Taggart v. Mandel, supra,* 391 F. Supp. at 740; *Cheng v. Illinois, supra,* 438 F. Supp. at 918 n.4. These regulations are less onerous than a total ban and are more than sufficient to assure that only a qualified person can become and remain a Texas notary public, regardless of citizenship.

C. The Court of Appeals Misapplied *Cabell* in Concluding that the Functions of Notaries Public Are "Political" and Thus Subject To a Less Demanding Standard of Review.

The court of appeals relied heavily upon *Cabell* in concluding that the citizenship requirement for Texas notaries was "political" rather than "economic" in nature and thus subject to a less rigorous standard of review. However, *Cabell* confirms that strict scrutiny should be applied here. Before turning to a specific discussion of *Cabell* and how the court of appeals misapplied its two-part standard for determining which state functions are "political," several preliminary observations are warranted.

Sugarman stated that a less demanding standard of review was to be the exception to the general rule of strict scrutiny for classifications involving aliens and was to be used in those cases involving "elective or important nonelective executive, legislative and judicial positions," for officers "who participate directly in the formulation, execution, or review of broad public policy," 413 U.S. at 647. While *Cabell* did not speak in terms of "political" functions being an exception to the category of "economic" functions, the opinion in no way expanded the definition of what is "political" and expressly endorsed the quoted language from *Sugarman* as the governing standard. 454 U.S. at 440.

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ico Law Digest, p. 16, 7 *Martindale-Hubbell Law Directory* (1983). *See generally* J. Vance and H. Clagett, *A Guide to the Law and Legal Literature of Mexico* 62-66 (1945).

It is particularly important not to give an expansive interpretation to what constitutes a "political" function of state government when, as here, the restriction does not apply to state employees. In cases where this Court has declined to apply strict scrutiny analysis, the jobs in question all involved positions on a government payroll: public school teachers, *Ambach v. Norwick, supra,* policemen, *Foley v. Connelie, supra,* or peace officers, *Cabell v. Chavez-Salido, supra.*

When restrictions apply to resident aliens as private individuals, however, strict scrutiny analysis has been utilized, even when the jobs could affect the public. Thus, in *Griffiths,* this Court distinguished between lawyers, who are officers of the court, though engaged in a private occupation, and other court officers, such as bailiffs, marshals and judges, who are full-time government officials. 413 U.S. at 728. This "distinction between a private occupation and a government function" was also highlighted in *Ambach v. Norwick, supra,* 441 U.S. at 76 n.6, which noted that the restriction in *Griffiths,* like the one at issue here, "applied to all attorneys, most of whom do not work for the government." *Id.* By contrast, the restriction on teachers in *Ambach* applied "only to teachers employed by and acting as agents of the State" and not to private school teachers. *Id.* While we do not suggest that the "economic" versus "political" functions dichotomy of *Cabell* should be replaced by a "private" versus "public" employment distinction, the latter is useful in determining which functions are "political" and which are not. Since notaries, like lawyers, generally perform functions licensed by the state while privately employed, this distinction helps place the Texas restriction in the same category as *Griffiths, Sugarman* and *Flores de Otero.*

Turning to *Cabell's* two-part standard for determining which state functions are "political," the court of appeals determined that this restriction satisfied the first prong, *i.e.*, it

was not "substantially overinclusive or underinclusive," 454 U.S. at 440, because it applied only to notaries public (Pet. App. 21a-22a). This conclusion is erroneous because the restriction fails on both counts. It is overinclusive because it denies a commission to qualified aliens such as petitioner, who was a notary public in Indiana for four years (Pet. App. 2a). It is also underinclusive since Texas court reporters, like notaries, are licensed by the State, Tex. Rev. Civ. Stat. Ann. art. 2324b(1), they are officers of the State (art. 2321), and they administer oaths and take depositions (art. 2324a(1)), yet they are not required to be citizens. Nor does Texas require that its Secretary of State be a United States citizen, Tex. Const. art. IV, § 21, even though he or she holds the highest appointive office in the State and performs many important functions, Tex. Rev. Civ. Stat. Ann. art. 4331, including supervision of the licensing of all notaries public (art. 5949(3)). Affirming the court of appeals in this case would produce a striking anomaly, since Mr. Bernal could be appointed as Secretary of State and thus decide which persons are qualified to serve as notaries public, even though he could not hold such a commission himself. Thus, it cannot be said that the classification involving notaries is "sufficiently tailored" wihin the meaning of *Cabell.* If anything, Texas has "indiscriminately swept in menial occupations, while leaving out some of the State's most important political functions," *Cabell v. Chavez-Salido, supra,* 454 U.S. at 440.

The Texas statute also fails to meet the second prong of the *Cabell* test, because notaries do not hold such an "important nonelective" post that they "participate directly in the formulation, execution, or review of broad public policy." *Id.* The court of appeals decided that this standard had been met largely because of the role played by notaries in acknowledging signatures and administering oaths on legal papers, as well as the deference and presumption of regularity which are given to notarized documents (Pet. App. 23a).

The principal problem with this analysis is that the functions performed by a notary public, which the majority found to be important in the smooth functioning of government, are "clerical" and "purely ministerial" in nature, as Judge Ingraham pointed out in dissent (Pet. App. 26a). Even the court of appeals' majority acknowledged that a notary is called upon simply to ensure that "those persons executing documents are accurately identified, to refuse to certify any identification that is false or uncertain and to insist that oaths are properly and accurately administered" (Pet. App. 23a). In carrying out those functions, important though they may be to the orderly processing of legal douments, it cannot be said that notaries are "performing a task 'that go[es] to the heart of representative government,'" *Ambach v. Norwick, supra,* 441 U.S. at 75-76, *quoting Sugarman v. Dougall, supra,* 413 U.S. at 647.

The essentially ministerial functions performed by notaries are thus worlds apart from the functions performed by state employees in those cases which have held that restrictions on aliens served "political" ends. For example, notaries public cannot make arrests or recommend revocation of an individual's liberty, as could the policemen in *Foley* and the deputy probation officers in *Cabell,* who exercise the coercive power of the state. Nor are the functions of notaries comparable to the responsibilities of public school teachers, who are charged with inculcating in young children "fundamental values necessary to the maintenance of a democratic political system," *Ambach v. Norwick, supra,* 441 U.S. at 77. While notaries do facilitate the carrying out of routine legal transactions, surely it cannot be said that by attesting to a signature on a deed or by swearing in a witness at a deposition, a notary is performing functions that are "so bound up with the operation of the State as a governmental entity as to permit the exclusion from those functions of all persons who have not become part of the process of self-government." *Id.* at 73-74.

Cabell specified that "political" functions must involve "discretionary decisionmaking, or execution of policy, which substantially affects members of the political community." *Id.* at 440-41, *quoting Foley v. Connelie, supra,* 435 U.S. at 296. However, as Judge Ingraham's dissent correctly points out, the majority opinion read this language as asking whether a notary public exercises *any* discretion in performing his or her duties, rather than whether the exercise of that discretion "would reveal a governing role" (Pet. App. 26a).

The court of appeals concluded that this standard had been met because notaries "are involved in countless matters of importance to the day-to-day functions of state government" (Pet. App. 23a). However, giving aliens discretion to notarize a will is not on a par with giving aliens the discretion to make an arrest or to decide how to teach American history to school children, as was the situation in *Foley* and *Ambach,* respectively. Indeed, *Cabell* expressly cautioned that its standard should not be broadly interpreted, since "almost any government official can be understood as participating in the execution of broad public policies." 454 U.S. at 441 n.7. Thus, if the court of appeals' analysis is followed, and notaries are found to be operating at "the heart of representative government," *id.* at 440, then it is hard to imagine what state function would not qualify as being so "important" that discrimination against resident aliens could be judged under the less demanding standard of review. In effect, what began in *Sugarman* as an exception to the general rule of strict scrutiny will have swallowed the rule whole.[7]

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[7] Also undermining the State's position that notaries serve a sensitive "political" role in state government is the fact that there are so many of them. In 1977, the last year for which published figures are readily available, Texas had 240,000 notaries — more than any other state. R. Rothman, *supra* note 2, at 181. According to the Secretary of State's office, that number has grown to 358,293 as of 30 November 1983, and thus there are more notaries in Texas than there are residents of Austin, the state capital (1980 population 345,496).

Finally, the State's argument that its statute serves "political" rather than "economic" ends relies heavily on the fact that petitioner is not required to become a notary public in order to keep his current job (Bernal Deposition at 8). *See* Brief in Opposition at 3. What the State seems to be arguing is that if the identifiable economic effects of a citizenship requirement are minimal, then the restriction comes within the "political" category. Neither *Cabell* nor any earlier case supports such an interpretation, and reliance on petitioner's current employment situation misses the point. Even though Mr. Bernal will not be fired if he loses this case, the Texas statute makes him ineligible for future paralegal jobs which may require him to be a notary public. In addition, the Texas statute can adversely affect other aliens in their quest for employment. For example, an employer may not explicitly require an applicant for a secretarial or a paralegal post to be a notary public. However, if there are two applicants who are otherwise equally qualified, one of whom is a notary and one of whom is not, the employer may, quite sensibly, choose the former applicant.[8]

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[8] Taken to its logical conclusion, the State's reliance on this factor would seem to suggest that strict scrutiny is limited to those situations in which a restriction totally denies a lawful alien the ability to earn a livelihood in a given field. Support for such an interpretation is not to be found in the case law, however, and several examples will illustrate the point.

A restriction on an alien's ability to apply for a state scholarship does not mean that he or she will be automatically denied a college education, since other scholarships may be available. Similarly, even if an alien cannot be employed in a state's civil service as a typist or senior clerk, that does not mean that he or she lacks other job opportunites in this line of work. Finally, a resident alien may be able to pursue a career as a law professor without being a member of a state bar. That does not mean, however, that a restriction on practicing law would have no "economic" consequences, since the professor may decide to leave academia and represent private clients or seek to supplement his or her law school salary with outside work. Yet in each of these instances, this Court has determined that restrictions on lawful aliens fall on the "economic" rather than the "political" side of the equation and has judged the restriction under strict scrutiny analysis. *See Nyquist v. Mauclet, supra; Sugarman v. Dougall, supra; In re Griffiths, supra.* The same reasoning should apply here as well.

For these reasons, *Cabell* and the similar cases bolster petitioner's argument that the Texas statute should be judged under strict scrunity analysis, and the court of appeals misapplied *Cabell* in concluding that the statute involved "political" goals. In the next portion of this brief, we shall demonstrate why, even if the statute is judged under the less demanding "rational relationship" test, it is still unconstitutional.

D. There Is No Rational Relationship Between the Ban on Aliens Serving as Notaries Public and the Achievement of a Legitimate State Interest.

This Court has stated that, when a state classification involves a sensitive government position, a court should only inquire whether there is a "rational relationship between the interest sought to be protected and the limiting classification." *Ambach v. Norwick, supra,* 441 U.S. at 74, *quoting Foley v. Connelie, supra,* 435 U.S. at 296. In concluding that this standard had been satisfied, the court of appeals stated: "The citizenship restriction in art. 5949(2) bears a rational relationship to the state's interest in the proper and orderly handling of a countless variety of legal documents of importance to the state" (Pet. App. 24a). This analysis is simply not enough to support the State's argument.

Petitioner acknowledges that a state may take steps to assure that only those people who are trustworthy and who understand the legal significance of a notary's duties are commissioned, thereby facilitating the execution and processing of legal documents and ultimately the smooth operation of state government. But pointing to the importance of a notary's function does not end the analysis. Instead, the State must go further and demonstrate how its goal of orderly execution and processing of notarized documents is rationally advanced by the blanket exclusion of all lawful resident aliens who are otherwise qualified to become notaries. This the State has failed to do. There is no evidence that aliens are so

incompetent or untrustworthy that, notwithstanding the regulations the State has imposed on notaries (*see* pp. 14-15, *supra*), a wholesale ban is reasonable in order to prevent an unacceptable increase in the number of legally defective documents.

Nor can the state's classification be regarded as a rational way of achieving a goal of efficient state operations when one recalls that Texas allows aliens to serve as official court reporters who, like notaries, administer oaths and apparently do so in a way that does not disrupt the judicial process. And if the state believes that allowing aliens to serve as notaries would disrupt the smooth functioning of state government, it is hard to understand why it has imposed no citizenship restriction on its Secretary of State, even though he or she performs many important state functions, including the licensing of notaries public. Even if the Court should conclude that this case involves a "political" rather than an "economic" classification, the State has failed to meet its burden under the "rational relationship" standard, and the statute cannot stand.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and remanded with instructions to reinstate the judgment of the district court.

Respectfully submitted,

CORNISH F. HITCHCOCK
(Counsel of Record)
ALAN B. MORRISON
JOHN CARY SIMS

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

THOMAS SULLIVAN
DENIS A. DOWNEY

Downey & Sullivan
1185 F.M. 802, Suite 3
Brownsville, Texas 78520
(512) 544-0561

Attorneys for Petitioner

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NO. 83-630

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, TERM, 1983

EFREM BERNAL,

Petitioner,

V.

JOHN W. FAINTER, JR., Secretary of State
of the State of Texas,
JOE RIVERA, County Clerk for Cameron County, Texas,
and, SANTOS SALDANA, County Clerk
for Hidalgo County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant

MARY F. KELLER
Assistant Attorney General

Counsel of Record

FERNANDO GOMEZ
Assistant Attorney General

P.O. Box 12548
Austin, Texas 78711
(512) 475-0671

Attorneys for Respondents

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QUESTION PRESENTED

May the State of Texas require United States citizenship for appointment to the Texas constitutional office of Notary Public?

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STATEMENT OF THE CASE

Margarita M. Vargas brought suit against the State of Texas challenging the statutory qualification that the office of notary public be held by United States citizens. At the time she initiated suit, Ms. Vargas was a resident alien, whose full-time employment as a secretary did not require her appointment as a notary public (Vargas Depos. at 12). During the course of these proceedings, Ms. Vargas became a citizen and the case became moot with respect to her.[1]

---

[1]The records do not reflect that Ms. Vargas reapplied for the office of notary public after she became eligible.

Efrem Bernal was employed as a paralegal at the time he entered this lawsuit. His job did not require his appointment as a notary public (Bernal Depos. at 8). Mr. Bernal is a resident alien; he is not a citizen of the United States because he "just had not seriously thought about it." (Bernal Depos. at 37). This case is not brought as a class action.

SUMMARY OF ARGUMENT

Petitioner, a resident alien, seeks appointment to the Texas constitutional office of notary public. Texas has excluded him from appointment to this public office because

it has determined that United States citizenship is a necessary requirement for holding the office.

The power to prescribe the qualifications for appointment to state office has been specifically reserved to the States by the United States Constitution. Texas has reasonably exercised this power by requiring citizenship and state residency of its notaries public to effectuate the state's legitimate interest in their continued accountability. The burden on Petitioner is minimal: he has been temporarily excluded from a public office which

affects neither his livelihood nor his basic existence in the community.

ARGUMENT

The State of Texas May Legitimately Require Citizenship For Appointment To the Texas Constitutional Office of Notary Public.

I. THE STATE OF TEXAS MAY PRESCRIBE THE QUALIFICATIONS FOR HOLDING THE PUBLIC OFFICE OF NOTARY PUBLIC, AS LONG AS THEY ARE RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

It is within the State's constitutional prerogative to prescribe the qualifications of its officers. Sugarman v. Dougall, 413 U.S. 634 (1973).

This authority emanates from those powers specifically reserved to the States by the Tenth Amendment to the United States Constitution to establish and operate their own governments. Id. at 648. The qualifications for public office may include citizenship "where citizenship bears some rational relationship to the special demands of the particular position." Id. at 647 (citation omitted).

A. The Office of Notary Public is a Public Office Under Texas Law

Constitutional status for the office of notary public dates from the Constitution of

1845, art. V, §19, which provided for the appointment by the governor with the advice and consent of the senate of not more than six notaries for each county. At the time of the 1875 Constitutional Convention, the constitutional provision for notaries public in art. IV, §26 was enacted to read as follows:

> Sec. 26. The Governor, by and with the advice and consent of two-thirds of the Senate, shall appoint a convenient number of Notaries Public for each county, who shall perform such duties as now are or may be prescribed by law.

During the 1875 debates, there was a proposal to strike Section 26 on the grounds that justices

of the peace acting as notaries would be sufficient. [See, McKay, Debates in the Texas Constitutional Convention of 1875, 166-67 (1930)]. Although that proposal was defeated, art. V, §19 of the 1876 Constitution continued the practice of permitting justices of the peace to be ex officio notaries public.

In 1940, the constitutional provision regarding the procedure for the appointment of notaries public was amended as follows:

> Section 26. (a) The Secretary of State shall appoint a convenient number of Notaries Public for each county who shall perform such duties as now are or may

be prescribed by law. The qualifications of Notaries Public shall be prescribed by law.
(b) Nothing herein shall affect the terms of office of Notaries Public who have qualified for the present term prior to the taking effect of this amendment.
(c) Should the Legislature enact an enabling law hereto in anticipation of the adoption of this amendment, such law shall not be invalid by reason of its anticipatory character.

Shortly after the constitutional amendment allowing for appointment of notaries by the Secretary of State, the Texas Legislature enacted statutory qualifications for notaries, including state residency and citizenship.

Texas is one of only six states to give the office of notary public constitutional

status. Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis, 361-62 (1977); see also, Taggart v. Mandel, 391 F.Supp. 732, 738 (D. Md. 1975) (constitutional office of notary public is a public office). There is no question that a notary public is a public officer under the Texas Constitution:

> A notary public is an officer who is given a commission of authority to administer oaths and take acknowledgements to documents of any kind requiring an oath. It is his duty to attest and certify by his hand and seal to the genuineness of documents so that they will be rendered available as

evidence of the facts contained therein. He thus imparts authenticity to documents.

The office is an ancient one originating in Roman jurisprudence and known to most Christian nations. It was recognized in England long before the Norman conquest.

In Texas notaries public were authorized to authenticate instruments during the days of Spanish and Mexican control. An act passed in 1837 by the Republic of Texas authorized the appointment of notaries. The Constitution of 1845 authorized the appointment of a convenient number of notaries public not exceeding six for each county, who were to perform duties prescribed by law and such other duties as the legislature should from time to time prescribe.

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Tex. Const. art. IV, §26, interp. commentary (Vernon 1955).[2]

Recognition by the State of Texas of notaries public as public officeholders distinguishes this case from In re Griffiths, 413 U.S. 717 (1973), where the Court noted that "the Connecticut Supreme Court. . . recognized that a lawyer is not an officer in the ordinary sense." Id. at 728. Texas's specific designation of notaries as constitutional officeholders

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[2]See also, Lawyers Surety Corporation v. Gulf Coast Investment Corporation, 410 S.W.2d 654, 657 (Tex. Civ. App.--Tyler), writ ref'd n.r.e. per curiam, 416 S.W.2d 779 (Tex. 1967) ("A notary is a public officer").

also sets this case apart from Foley v. Connelie, 435 U.S. 291 (1978); Ambach v. Norwick, 441 U.S. 68 (1979); and Cabell v. Chavez-Salido, 454 U.S. 432 (1982). In each of those cases, the states did not claim that the jobs represented "public offices" in the traditional sense. Instead, the states urged that the jobs were functionally so important to the "concept of democratic self-government" that the states should have the right to prescribe their qualifications, subject to limited judicial review. This Court agreed.

Here, the State of Texas has historically and consistently exercised its

constitutional prerogative to include the office of notary public firmly within its definition of its political community. Texas has the right to do so:

> Definition of the important sovereign functions of the political community is necessarily the primary responsibility of the representative branches of government, subject to limited judicial review.

Cabell, supra, at 445; see also, Clements v. Fashing, 452 U.S. 404 (1982) (Stevens, J., concurring) (state's legitimate interest in structuring its own form of government).

B. The Duties of the Office of Notary Public In Texas are Sufficiently Important to Qualify It as a Public Office

Absent a designation by the state that a particular position is a public office, the Court "will look to the importance of the function as a factor giving substance to the concept of democratic self-government" in determining whether a position holds "public office" status. Cabell, supra, at 441, n. 7. Under Texas law, notaries public operate in a capacity similar to that of a county clerk.

> Notaries Public shall have the same authority to take acknowledgments or proofs of written instruments, protest instruments permitted by law to be protested, administer oaths, and take depositions, as is now or may hereafter be conferred by law upon County Clerks, and provided that all Notaries Public shall print or stamp their names and the expiration dates of their commissions under their signatures on all such written instruments, protest instruments, oaths, or depositions; provided further that failure to so print or stamp their names and expiration dates of their commissions under their signatures shall not invalidate such acknowledgment.

Tex. Rev. Civ. Stat. Ann. art. 5954 (Vernon 1983) (emphasis added). They are required to keep public records:

> . . . . The book herein required to be kept, and the statements herein required to be entered shall be an original public record, open to inspection by any citizen at all reasonable times. Each notary public shall give a certified copy of any record in his office to any person applying therefor on payment of all fees thereon.

Tex. Rev. Civ. Stat. Ann. art. 5955 (Vernon 1983); and to provide a seal of office:

> Each notary public shall provide a seal of office whereon shall be engraved in the center a star of five points, and the words, "Notary Public, State of Texas," around the margin and he shall authenticate all his official acts therewith. The use of a seal with the name of a county, when used by a qualified notary public, will not invalidate the acknowledgment.

Tex. Rev. Civ. Stat. Ann. art. 5960 (Vernon 1983) (emphasis added).

One of the notary's most important functions is the acknowledgment of written instruments. Tex. Rev. Civ. Stat. Ann. art. 6602 (Vernon 1983) provides that "the acknowledgment or proof of an instrument of writing for record may be made within this state before: a. A Clerk of the District Court. b. A Judge or Clerk of the County Court. c. A Notary Public." Thus, a notary public is <u>one of only three officers</u> entitled to take these acknowledgments or proofs of written instruments;

upon the placing of the notary's seal of office, the acknowledged instrument becomes recordable.

Notaries are also authorized to administer oaths. This power of administering oaths is significant in numerous legal transactions, particularly in probate, evidence, suits involving title to real estate, and suits seeking a declaration of heirship. For example, the Texas Probate Code, delineating "Requisities of a Will," provides as follows:

> . . . . Such a will or testament may, at the time of its execution or at any subsequent date during the lifetime of the testator and the witnesses, be made self-proved, and the testimony of the witnesses in the probate thereof may be made unnecessary, by the affidavits of the testator and the attesting witnesses, made before an officer authorized to take acknowledgments to deeds of conveyance and to administer oaths under the laws of this State. . . . The affidavits shall be evidenced by a certificate, with official seal affixed, of such officer attached or annexed to such will or testament in form and contents substantially as follows: . . . .

Tex. Prob. Code Ann. §59 (Vernon 1983) (emphasis added).

Section 84 of the Probate Code provides that if a will is

self-proved as provided above, "no further proof of its execution with the formalities and solemnities . . . shall be necessary."

The only similarity between notaries and court reporters is that they are both authorized to take depositions. The powers of court reporters are statutorily created and narrowly confined.

> All official District Court reporters are authorized to take depositions of witnesses, and to receive, execute and return commissions, administer oaths and affidavits, in connection with such depositions, and make a certificate of fact, and do all other things necessary in the taking of such depositions in accordance with existing laws.

Tex. Rev. Civ. Stat. Ann. art. 2324a (emphasis added). Court reporters may only administer an oath in connection with a deposition; they do not have the authority to authenticate documents. Nor are notaries similarly situated to the Secretary of State. The Secretary of State is appointed by the governor with the advice and consent of the Senate. Tex. Const. art. IV, §21. The same gubernatorial appointment process was in effect for notaries prior to 1940 and prior to the enactment of the statutory qualification of citizenship and residency. The Texas

Legislature has uniformly considered that appointment by the governor with advice and consent of the Senate sufficiently guarantees accountability that separate requirements of citizenship and residency are not necessary.[3]

In contrast to court reporters and the Secretary of State, the constitutional office of notary public has assumed duties parallel to the duties of the constitutional offices of the county clerk and the

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[3]Nor are the duties of a notary similar to those of the Secretary of State. See, Ambach, supra, at 81, n. 15.

justice of the peace. All three officeholders may administer oaths, Tex. Rev. Civ. Stat. Ann. art. 5954 (Vernon 1983); Tex. Rev. Civ. Stat. Ann. art. 1935 (Vernon 1964); Tex. Rev. Civ. Stat. Ann. art. 2376 (Vernon 1983), authenticate documents, Tex. Rev. Civ. Stat. Ann. art. 6602 (Vernon 1983), and take depositions, Tex. Rev. Civ. Stat. Ann. art. 5954 (Vernon 1983); Tex. Rev. Civ. Stat. Ann. art. 1935 (Vernon 1964); Tex. Rev. Civ. Stat. Ann. art. 2376 (Vernon 1983). Citizenship is a requirement for all three public offices. Tex. Rev. Civ. Stat. Ann.

art. 5949 and Tex. Elec. Code Ann. art. 1.05 (Vernon 1983).

II. THE REQUIREMENT OF CITIZENSHIP FOR NOTARIES PUBLIC IS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST.

A. The State of Texas Has a Legitimate Interest in the Continuing Accountability of Its Notaries Public

Since 1945, following the constitutional amendment providing for appointment of notaries by the Secretary of State, Texas has required that notaries public be residents of the state and citizens of the United States. These two requirements reflect the State's legitimate concern that notaries be reasonably

familiar with state law and institutions. Ambach, supra, at 80, n. 14; Sugarman, supra, at 660 (Rehnquist, J., dissenting). The requirements also reflect the State's recognition that notaries may be called upon years later to testify to the acts they have performed. See, Pollard v. State of Texas, 484 S.W.2d 387 (Tex. Civ. App.--Waco 1972, writ ref'd n.r.e.) (testifying as to notarizing deed eleven years earlier); Hale v. Hays, 441 S.W.2d 275 (Tex. Civ. App.--El Paso 1969, no writ); and Gomez v. Riddle, 334 S.W.2d 197

(Tex. Civ. App.--San Antonio 1960, no writ). The Texas Legislature has legitimately assumed that notaries who are citizens are as a practical matter more likely to be available to testify in the future. See, Nyquist v. Mauclet, 432 U.S. 1, 22 (1977) (Rehnquist, J., dissenting) (easier to collect repayment of loans from citizens than from aliens). As a matter of law, citizens have a duty to testify.

> It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.

Blackmer v. United States, 284 U.S. 421 (1932). Even if citizens and non-citizens were equally likely to leave the State, only the citizen has the on-going duty to return to testify should the need arise.

The State of Texas's requirement that notaries be residents and citizens is a rational attempt by the state to insure continuing accountability of its notaries. Texas's distinction between citizens and non-citizens does not violate equal protection even if the State could have selected another means of achieving the desired ends. Massachusetts Bd. of Retirement v. Murgia, 427 U.S.

307, 316 (1976); Matthews v. Diaz, 426 U.S. 67, 68 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 51 (1973).

B. The Requirement of Citizenship for the Office of Notary Public Does not Place an Onerous Burden on Petitioner

In testing the validity of state statutes under the Equal Protection Clause, this Court has often made inquiry into the nature of the fundamental personal rights endangered by the classification involved. Weber v. Aetna Casualty and Surety Company, 406 U.S. 164, 173 (1972). Here, Petitioner testified that, although eligible for citizenship, in his

twenty-three years in this country he has failed to apply. Therefore, his exclusion from the office of notary public is merely a temporary one, pending his becoming a United States citizen. Ambach, supra, at 69; Sugarman, supra, at 650 (Rehnquist, J., dissenting). Furthermore, Petitioner's ability to seek a livelihood or to "exist in the community" has not been threatened in anyway by the classification. In re Griffiths, supra, at 722; Foley, supra, at 295. In fact, Petitioner characterized his loss as one of mere inconvenience: "[I]t is very hard and inconvenient to get one of the other paralegals to go out with

me to just get an affidavit or statement notarized." (Bernal Depos. at 8).

The temporary inconvenience that the State's classification has caused Petitioner does not outweigh the State's legitimate interest in insuring the on-going accountability of its notaries. The distinction drawn between citizens and non-citizens by the State of Texas promotes a legitimate state interest without depriving Petitioner of his ability to exist in the community.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JIM MATTOX
Attorney General of
Texas

DAVID R. RICHARDS
Executive Assistant

MARY F. KELLER
Counsel of Record

FERNANDO GOMEZ
Assistant Attorney
General
P.O. Box 12548
Austin, Texas 78711
(512) 475-6071

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No. 83-630-CFX
Status: GRANTED

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October 14, 1983

Title: Efrem Bernal, Petitioner
v.
John W. Fainter, Jr., Secretary of State of Texas, et al.

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Hitchcock, Cornish F.

Counsel for respondent: Gomez, Fernando C.

Entry	Date	Note	Proceedings and Orders
1	Oct 14 1983	G	Petition for writ of certiorari filed.
2	Nov 16 1983		DISTRIBUTED. December 2, 1983
5	Nov 17 1983	X	Brief of respondent Fainter, Sec. of St. of TX in opposition filed.
6	Dec 5 1983		Petition GRANTED.
			**********
7	Dec 13 1983	G	Motion of petitioner to disperse with printing the joint appendix filed.
8	Jan 9 1984		Motion of petitioner to dispense with printing the joint appendix GRANTED.
9	Jan 19 1984		Brief of petitioner Efrem Bernal filed.
10	Jan 25 1984		Record filed.
11	Jan 25 1984		Certified original record & C.A. proceedings, 2 volumes received.
12	Feb 14 1984		SET FOR ARGUMENT. Wednesday, March 28, 1984. (4th case)
14	Feb 15 1984		Order extending time to file brief of responcent on the merits until February 25, 1984.
15	Feb 27 1984		Brief of respondents Fainter, Sec. of St. of TX filed.
16	Mar 19 1984		Record filed.
17	Mar 19 1984		Certified exhibits received.
18	Mar 28 1984		ARGUED.